

Memo. of cases in re implied negative covenant:

13 Corpus Juris pg. 1104

232 Fed. 609, 613

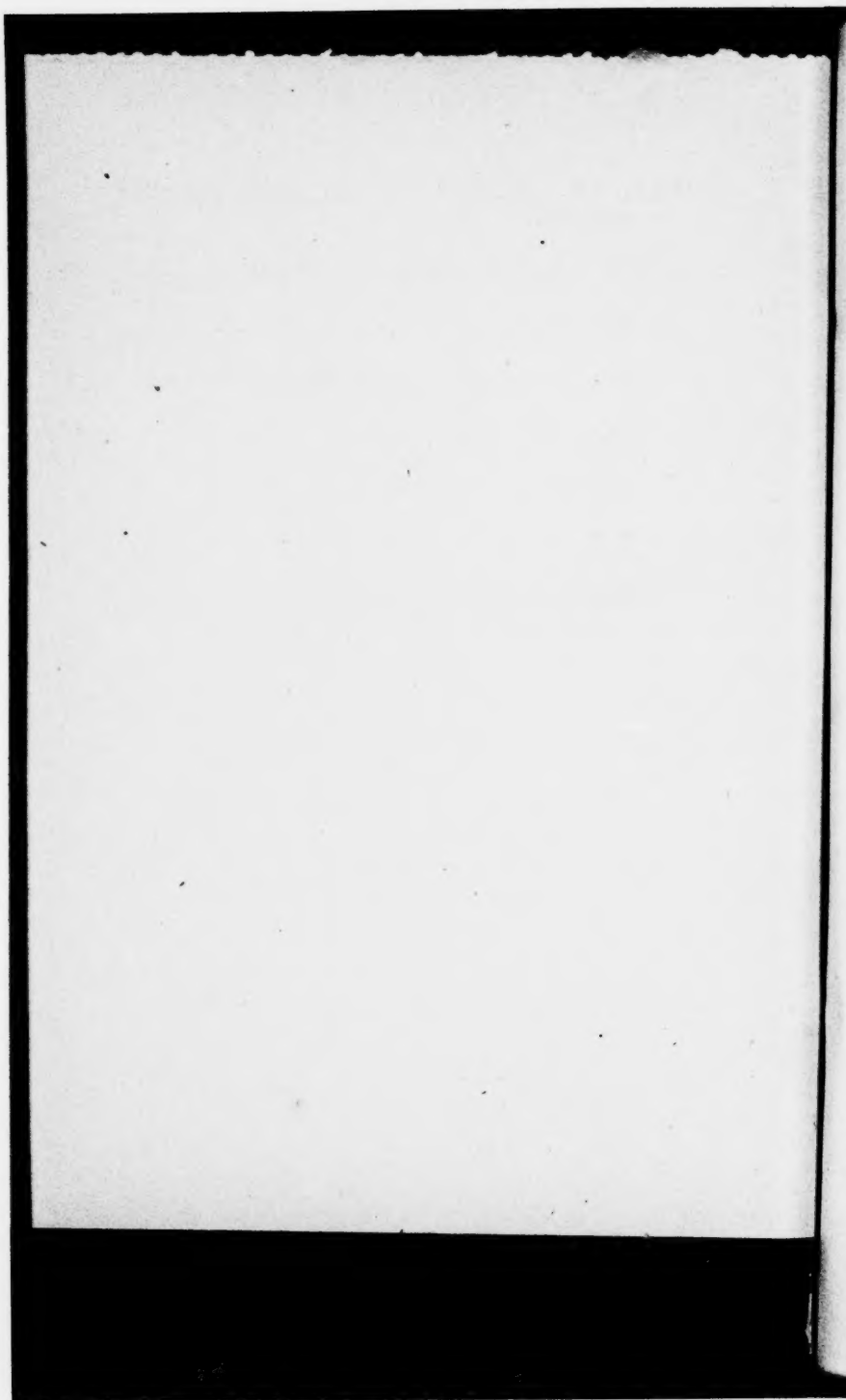
232 Fed. 240, Affirmed 239 Fed. 109

248 Fed. 944, 947

247 Fed. 822, 827

8 Wall. 276, 288

High on Injunctions,
4th Ed., Sec. 1151A



(27,117)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 370.

J. HARTLEY MANNERS, PETITIONER,

vs.

OLIVER MOROSCO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

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United States Circuit Court of Appeals for the Second Circuit.

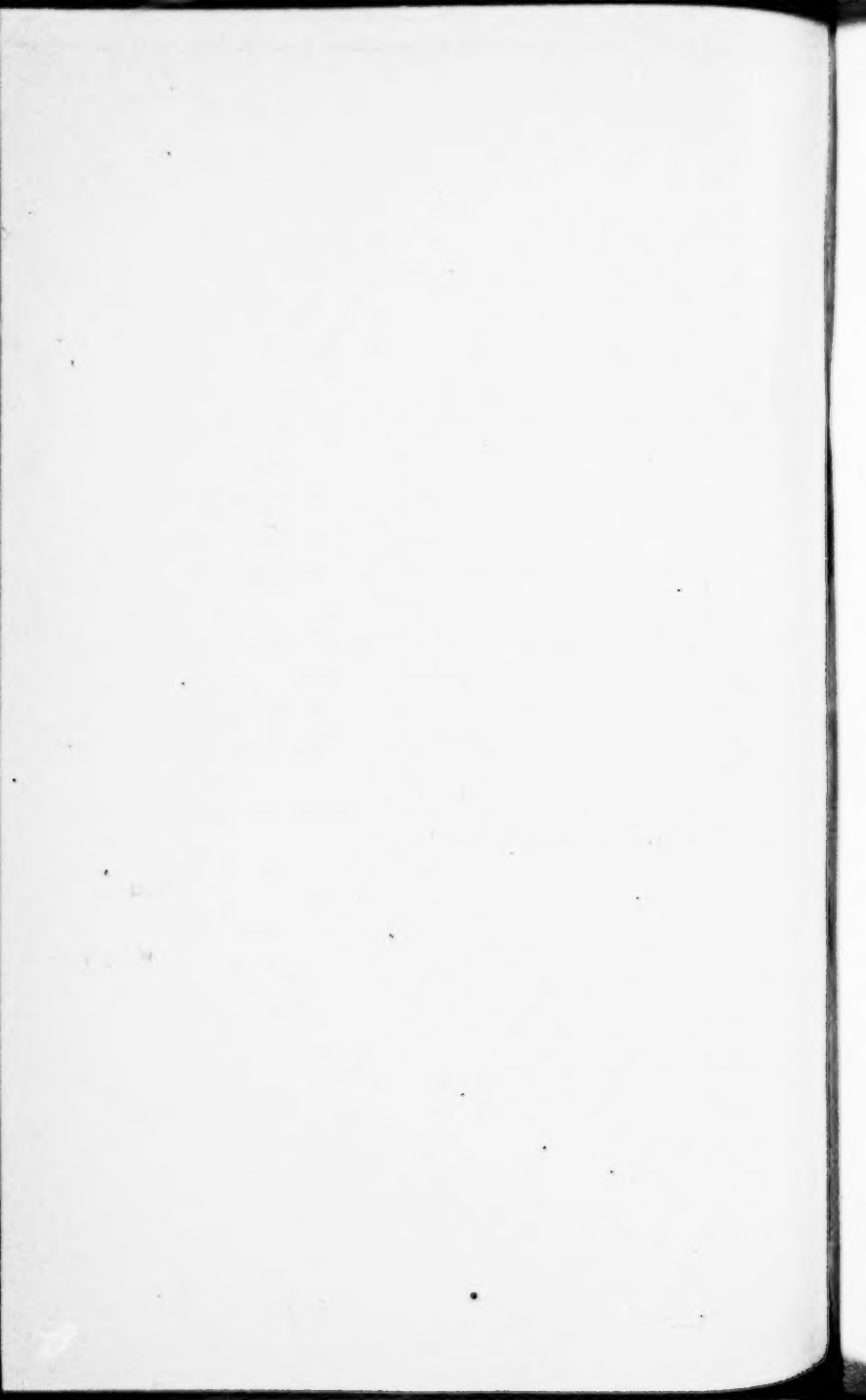
J. HARTLEY MANNERS, Plaintiff-Appellant,
against

OLIVER MOROSCO, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern
District of New York.

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Second Circuit. Filed
Jan. 18, 1919. William Parkin, Clerk.



Subpœna.

1

THE PRESIDENT OF THE UNITED STATES OF AMERICA,
TO OLIVER MOROSCO GREETING:

YOU ARE HEREBY COMMANDED to appear before
the Judges of the District Court of the United
States of America for the Southern District of New
York, in the Second Circuit, to answer a bill of
complaint exhibited against you in the said Court
in a suit in Equity, by J. Hartley Manners and to
further do and receive what the said Court shall
have considered in this behalf; and this you are not
to omit under the penalty on you of TWO HUNDRED 2
AND FIFTY DOLLARS (\$250).

WITNESS, Honorable LEARNED HAND, Judge of
the District Court of the United States for the
Southern District of New York, at the City of New
York, on the 26th day of August in the year one
thousand nine hundred and eighteen and of the In-
dependence of the United States of America the
one hundred and forty-third

ALEX. GILCHRIST JR.

Clerk.

DAVID GERBER

Complt's Sol'r.

3

The defendant is required to file his answer or
other defense in the above cause in the Clerk's office
of this Court, on or before the twentieth day after
service hereof excluding the day of said service;
otherwise the bill aforesaid may be taken *pro*
confesso.

ALEX GILCHRIST JR.

Clerk.

[SEAL]

4

Bill of Complaint.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,

AGAINST

OLIVER MOROSCO,
Defendant.

5

TO THE HONORABLE, THE JUDGES OF THE DISTRICT
COURT OF THE UNITED STATES, FOR THE SOUTH-
ERN DISTRICT OF NEW YORK:

J. Hartley Manners, a subject of the United
Kingdom of Great Britain and Ireland, domiciled
in the Borough of Manhattan, City of New York,
State of New York, within the Southern District
of New York, brings this, his bill of complaint,
against Oliver Morosco, a citizen of the State of
California, and thereupon your complainant shows
unto your Honors:

6

FOR A FIRST CAUSE OF ACTION.

FIRST: That your complainant is and at all the
times hereinafter mentioned was a subject of the
United Kingdom of Great Britain and Ireland.

SECOND: That the defendant, Oliver Morosco, at
all the times hereinafter mentioned was and now
is a citizen of the State of California, having an
office and place of business for the transaction of
business in person in the Borough of Manhattan,

Bill of Complaint.

City of New York, State of New York, within the 7
Southern District of New York, in which City and
District said defendant is to be found.

THIRD: That your complainant is by profession
an author and dramatist.

That the complainant originated and wrote a
dramatic composition to which he gave the title
of "Peg O' My Heart". That the said play was
original with your orator, and was not taken,
copied or adapted from any other play, story,
book or publication, and the title thereof "Peg O'
My Heart" was original with your orator, and 8
had not theretofore been used as the title of any
other play, dramatic composition, story or book,
and the said play and the title thereof were the
original conception and invention of your com-
plainant.

FOURTH: That on or about the 16th day of July,
1918, your complainant, being the author, owner
and proprietor of the said dramatic composition
"Peg O' My Heart", and the same never having
before been printed or published in this or any
foreign country (except in form of a novel, and as
hereinafter set forth), and the same being a work 9
copyrightable under the Copyright Laws of the
United States, and your orator being then domi-
ciled within the United States, to wit, being domi-
ciled in the City of New York, State of New York,
within the Southern District of New York, did se-
cure copyright of the said dramatic composition
"Peg O' My Heart", by publishing the same and
offering the same for sale to the general public in
the United States, with the following notice of
copyright inscribed and affixed upon the first page
of each copy thereof, published or offered for sale

Bill of Complaint.

- 10 in the United States, to wit, "Copyright, 1918, by J. Hartley Manners".

That the said notice of copyright was and has been affixed upon the first page of each copy of said dramatic composition published or offered for sale in the United States.

- 11 FIFTH: That thereafter, and on or about the 19th day of July, 1918, complainant duly registered his claim to copyright with the Register of Copyrights, Washington, District of Columbia, and did on the 18th day of July, 1918, deposit in the mail within the United States, addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition of the said dramatic composition "Peg O' My Heart" then published, together with a written claim to copyright therein and thereto; and accompanied by an affidavit under the official seal of an officer authorized to administer oaths within the United States, duly made by the printer who printed the book, setting forth that the copies deposited had been printed from type set within the limits of the United States, and from plates made therein and that the binding of the said book had been performed
- 12 within the limits of the United States. That such affidavit also stated the place where and the establishment in which such type were set and plates were made and binding was performed and the date of the completion of the printing of said book and the date of publication. That the facts stated in said affidavit were true.

That the said two complete copies of the best edition of the said work so deposited in the mail as aforesaid were printed from type set within the limits of the United States, and from plates made within said limits of the United States, and were

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bound within said limits of the United States. 13
That thereupon the Register of Copyrights issued
unto your complainant a certificate of copyright
registration of said dramatic composition. That
annexed hereto, marked "Exhibit 1" is a copy of
the certificate of the Register of Copyrights, Wash-
ington, District of Columbia, showing that two
copies of said work were duly deposited in the
Copyright Office, as hereinbefore alleged, together
with an affidavit prescribed by section 16 of the Act
entitled "An Act to Amend and Consolidate the
Acts respecting Copyrights", and that registration
of the claim to copyright was duly made by your 14
complainant; that a copy of said copyrighted work
is deposited with the Clerk of this Court on the
filing of this bill, and complainant begs leave to
produce the same upon the hearing or trial of this
action, or any motion made in the course of this
suit.

SIXTH: Your orator further shows that at the
times herein mentioned, Dodd, Mead and Com-
pany was and is a domestic corporation, and was
and is a corporation organized and existing under
and by virtue of the laws of the State of New York,
and having its principal place of business in the 15
Borough of Manhattan, City of New York, South-
ern District of New York, and now is and for
many years past, and at the times hereinafter men-
tioned was, engaged in the business of publishing
books.

SEVENTH: That heretofore, and on or about the
30th day of October, 1913, the said Dodd, Mead
and Company, being then a corporation organized
and existing under and by virtue of the laws of the
State of New York, and having its principal place

Bill of Complaint.

- 16 of business in the Borough of Manhattan, City of
New York, and within said Southern District of
New York, and the said play "Peg O' My Heart"
having never before been printed or published in
this or any foreign country, did with the consent
and by authority of your complainant, print and
publish, in the form of a novel or story, the said
play "Peg O' My Heart", and did offer the same
for sale to the general public in the United States,
with the following notice prescribed and affixed
upon the first page of each copy of said book, to
wit, "Copyright, 1913, by Dodd, Mead and Com-
17 pany". That the said notice of copyright was and
has been affixed upon the first page of each copy
of the said book published or offered for sale in the
United States.

- EIGHTH: That thereafter and on or about the 4th
day of November, 1913, the said Dodd, Mead and
Company duly registered its claim to copyright
with the Register of Copyrights, at Washington,
District of Columbia, and did on said 4th day of
November, 1913, deposit in the mail, addressed to
the Register of Copyrights, Washington, District
of Columbia, two complete copies of the best edi-
18 tion of the said book, "Peg O' My Heart" then
published, together with a written claim to copy-
right therein and thereto, accompanied by an affi-
davit under the official seal of an officer authorized
to administer oaths within the United States, duly
made by the printer who printed the book, setting
forth that the copies deposited had been printed
from type set within the limits of the United
States and from plates made within the limits of
the United States, and that the binding of the said
book was performed within the limits of the United
States, which affidavit stated the place where and

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the establishment in which such type was set and 19
plates made and binding performed, and the date
of the completion of the printing of the book and
the date of publication thereof. That the facts
stated in the said affidavit were true. That there-
upon the Register of Copyrights issued to said
Dodd, Mead and Company a certificate of copy-
right registration of the said book. That annexed
hereto, marked "Exhibit 2" is a copy of the certifi-
cate of the Register of Copyrights, Washington,
District of Columbia, showing that two copies of
said book were duly deposited in the Copyright
Office on the 4th day of November, 1913, together 20
with said affidavit hereinbefore referred to, and
that the registration of copyright was duly made
upon the said day. That a copy of said copyrighted
book is deposited with the Clerk of this Court on
the filing of the bill of complaint, and your com-
plainant begs leave to produce the same upon the
hearing or trial of this action, or any motion made
in the course of this suit.

NINTH: That said Dodd, Mead and Company did
assign and execute to your orator an assignment
of the sole and exclusive right to translate the said
copyrighted work into other languages or dialects, 21
and to make any other version thereof; also the
exclusive right to dramatize said copyrighted
work; also the exclusive right to perform or repre-
sent said copyrighted work publicly in any manner
and by any method by which said copyrighted work
may be exhibited, performed, represented, produced
or reproduced, and the exclusive photo-play and
motion picture rights and the right to exhibit, per-
form, represent, produce or reproduce the said
copyrighted work, or any dramatization thereof, by
means of motion pictures, and to authorize and

Bill of Complaint.

- 22 license others so to do, with the right to print, publish, copyright and vend any of said translations, dramatizations, photo-play or motion pictures, or any serialization of the copyrighted work, during the term of said copyright, or any renewal thereof.

TENTH: That said assignment was duly recorded in the Copyright Office on January 15, 1917, in Book 67, pages 188-189. That annexed hereto, marked "Exhibit 3" is a copy of the said assignment with a certificate of the Register of Copyrights of the due and proper recording of the said assignment in the Copyright Office.

23

ELEVENTH: That the said dramatic composition "Peg O' My Heart" has been performed upon the stage in the various cities of the United States, with great success and profit. That the said dramatic composition was played in New York City, at the Cort Theatre, continuously from December 20, 1912, until May 30, 1914, covering a period of seventy-four consecutive weeks, playing to gross receipts of \$750,860, or at an average of over \$10,000 a week. That the principal part of the said dramatic composition is the character known as "Peg O' My Heart", which was played by your complainant's wife, who is professionally known upon the stage as Laurette Taylor. That various dramatic companies performed the said play in the various cities of the United States, and there was taken in from performances given of the said play in excess of \$3,500,000 and royalties have been paid to your complainant from the performances of the said dramatic composition, amounting to \$214,540.29.

24

TWELFTH: That the rights of your complainant in and to the said dramatic composition have been

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respected and recognized until the doing of the 25
wrongful acts by the defendant, herein complained
of.

THIRTEENTH: Your orator further complains
and says that the said dramatic composition readily
lends itself to a stage representation and perform-
ance of the same by means of motion pictures, and
that the said dramatic composition, as a photo-play
performance and representation upon the stage, by
means of motion pictures, is exceedingly valuable,
and your complainant has been offered large sums
for the right to produce and represent upon the 26
stage the said dramatic composition, by means of
motion pictures as a photo-play.

FOURTEENTH: That a motion picture perform-
ance of a dramatic composition is given with
scenery and costumes, by a company of actors
before a high-speed camera, and thereupon from
the negative films there are printed positive films,
which positive films are exhibited upon a screen
by means of a projecting machine, in theatres and
places of entertainment, to which the audience is
invited for a specified price of admission, the
prices varying according to the location of the 27
seats. That the story told by this method is the
same story as told when the play is performed
by living actors and actresses, and told in the
same order and sequence. That performances
of motion pictures or photo-plays are given in
theatres throughout the United States, for which
an admission is charged, and the public is invited
to witness a stage performance and representa-
tion by means of motion pictures or as a photo play
of the play advertised or announced for perform-
ance; that large revenues are derived from motion

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- 28 picture performances and stage representations of photo-plays, and in the various cities of the United States there are motion picture theatres devoted exclusively to stage performances and representations of photo-plays. That one of the most valuable assets possessed by an author or proprietor of a successful dramatic composition is the right to perform and represent the same and authorize others to perform and represent the same as a photo-play or by means of motion pictures, and as hereinbefore stated, the right to present and authorize others to present said dramatic composition, "Peg O' My Heart", as a motion picture or photo-play, possessed by your complainant, is of great value.
- 29

- FIFTEENTH: Your complainant further shows that the defendant, Oliver Morosco, has threatened and intends to, and has publicly announced that he will produce and represent and authorize others to produce and represent upon the stage said dramatic composition, "Peg O' My Heart," as a motion picture photo-play, under said title, "Peg O' My Heart," and has notified complainant that he intends to represent and perform, and authorize others to represent and perform, as a motion picture photo-play, complainant's dramatic composition, "Peg O' My Heart," in motion picture theatres, under said title, within the Southern District of New York, and elsewhere throughout the United States, without the consent, license or permission of complainant, and against his protest.
- 30

SIXTEENTH: Your complainant further shows that if the said defendant is permitted and allowed to give and authorize others to give mo-

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tion picture performances of the said dramatic composition, "Peg O' My Heart", without the consent, license, authority or permission of your complainant, and continues to advertise his intention to produce and license others to produce the play as a photo-play or by means of motion pictures, it will irreparably injure the value of complainant's rights in and to the said dramatic composition and the right to produce and represent the same upon the stage as a photo-play or by means of motion pictures, and will break down the exclusive right which complainant has in and to said dramatic composition, and in and to the exclusive right to perform and represent the same and authorize others to perform and represent the same as a photo-play, or by means of motion pictures, or otherwise, and break down and destroy the exclusive right which complainant has to represent and authorize others to represent the said play "Peg O' My Heart" upon the stage.

SEVENTEENTH: That the acts of the defendant in publicly announcing in the public press and otherwise that he will produce and represent, and license others to produce and represent the said dramatic composition "Peg O' My Heart" as a photo-play and upon the stage, is causing great injury and damage to the business and profits of your complainant.

EIGHTEENTH: That theatrical managers and producers of motion pictures will not deal with one who has not the exclusive right to give and authorize the giving of motion pictures, nor will they pay the value of a motion picture right to one who is not the exclusive owner of such right

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34 in the play and cannot protect the theatrical manager or producer in such exclusive right to the performance, and the acts of the defendant hereinbefore referred to will lead theatrical managers and producers of motion pictures and purchasers of motion picture rights to refrain from continuing negotiations or dealing with your complainant for the right to produce said dramatic composition, "Peg O' My Heart", as a photo-play.

That the injury and damage caused by the wrongful acts of the defendant hereinbefore referred to cannot be accurately ascertained and
35 computed and adequate compensation therefor cannot be made in any action at law; that no damages recoverable in an action at law will afford complainant adequate relief, and the damages which may be suffered by the complainant are not capable of exact estimation or calculation, and are irreparable.

NINETEENTH: That the value to your complainant in the said dramatic composition consists in the fact that he has the exclusive right to produce and license others to produce the play upon the stage, and that he can be protected by the
36 Courts in such exclusive right, and if the defendant or any other person should represent the play as a photo-play or otherwise, without the consent, license or permission of your complainant, it will irreparably injure him in his business and rights, and he will suffer great and irreparable loss and pecuniary damage.

FOR A SECOND CAUSE OF ACTION:

TWENTIETH: The complainant hereby reiterates and reasserts each and every allegation set forth in paragraphs numbered "First," "Second,"

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"Third," "Fourth," "Fifth," "Sixth," "Seventh," 37
 "Eighth," "Ninth" and "Tenth," respectively, as
 though the allegations therein set forth were
 reiterated and again set forth at length.

TWENTY-FIRST: Your orator further alleges that
 the said dramatic composition "Peg O' My Heart"
 was written by your orator with a view to hav-
 ing the star part played by Laurette Taylor, who
 is the wife of your orator, and who, for purposes
 of designation, is herein referred to as Laurette
 Taylor, which is her stage or professional name;
 Miss Taylor being a well known and successful 38
 actress, playing and performing star or principal
 parts.

TWENTY-SECOND: That on or about the 19th day
 of January, 1912, your orator gave to the defend-
 ant a license to produce, perform and represent
 the said dramatic composition, "Peg O' My Heart,"
 in manner and form as follows, to wit:

"**AGREEMENT** made and entered into this
 Nineteenth day of January, one thousand nine
 hundred and twelve, between J. HARTLEY MAN-
 NERS of the City, County and State of New 39
 York, party of the first part, and OLIVER MO-
 ROSCO, of the Burbank Theatre, Los Angeles,
 California, party of the second part.

WITNESSETH:

WHEREAS the party of the first part is the
 sole and exclusive author and owner of a cer-
 tain dramatic composition at present entitled
 'Peg O' My Heart' and

WHEREAS, the party of the second part
 wishes to obtain the exclusive right and li-

Bill of Complaint.

40 cense to produce, perform and represent the
said play in the United States of America and
the Dominion of Canada.

41 NOW THEREFORE in consideration of the
premises and of the mutual covenants and
promises of the parties of these presents here-
inafter contained and in consideration of the
sum of One Dollar, lawful money of the United
States, this day by each of the parties hereto
to the other in hand paid, the receipt whereof
is hereby reciprocally acknowledged, and for
other good, valuable and adequate considera-
tion it is hereby understood, covenanted and
agreed by and among the parties to the agree-
ment as follows:

FIRST: The party of the first part hereby
grants and by these presents hereby does
grant to the party of the second part subject
to the terms, conditions and limitations here-
inafter expressed, the sole and exclusive li-
cense and liberty to produce, perform and
represent the said play in the United States
of America and the Dominion of Canada.

42 SECOND: The party of the second part in
consideration of such grant hereby agrees to
pay to the party of the first part the sum of
Five hundred (\$500.00) dollars upon the sign-
ing and execution of this agreement, the re-
ceipt whereof is hereby acknowledged, and
which sum shall be in advance of the royalties
to accrue to the party of the first part under
this agreement, and is not to be returned to
the party of the second part under any cir-
cumstances whatsoever, but is to be credited
as the payment of the first royalties as herein-

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after provided, if the said play shall be produced by the said party of the second part under this agreement. 43

THIRD: The party of the second part agrees to produce the play not later than January first, 1913 and to continue the said play for at least seventy-five performances during the season of 1913-1914 and for each theatrical season thereafter for a period of five years.

FOURTH: The party of the second part further agrees to pay to the party of the first part not later than the first Wednesday following each and every week during which a performance of the said play shall have been given, further sums as royalties, as follows: 44

Five per cent. (5%) of the first four thousand five hundred (\$4500) dollars gross weekly receipts; seven and one half (7½) per cent on the next two thousand (\$2,000) dollars gross weekly receipts; and ten (10%) per cent on all sums over that amount of six thousand five hundred (\$6,500) dollars gross weekly receipts—which said sum of money, together with certified box-office statements, the party of the second part agrees to send to the party of the first part. 45

FIFTH: The said party of the second part further agrees that if during any one theatrical year, such year to begin on the first day of October, said play has not been produced or presented for seventy-five performances, then all rights of the said party of the second part shall cease and determine and shall im-

Bill of Complaint.

46 immediately revert to the said party of the first part.

47 SIXTH: It is further agreed that the said party of the second part shall present the said play in first class theatres with a competent company, the said company to be mutually satisfactory to both the parties to this agreement, and with Miss Laurette Taylor in the title role of 'Peg O' My Heart' and that the play will have a production in New York City and will be continued on the road with Miss Taylor in the part of 'Peg' for at least one season or longer if considered advisable by both parties to this agreement.

SEVENTH: No alterations, eliminations or additions to be made in the play without the approval of the author.

EIGHTH: The rehearsals and production of the play to be under the direction of the author.

48 NINTH: The name of the author to appear on all advertising, reading and printed matter used in connection with the play.

TENTH: The author to have the right to print and publish the play, but this right is not to be exercised by the author within six months after the production of said play in New York City unless the written consent of the manager has first been obtained.

ELEVENTH: Said manager does hereby agree that he will not lease, sub-let, assign, transfer or sell to any person or persons, firm or cor-

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poration any of his aforesaid rights in and 49
to the said dramatic composition or play with
out the written consent of said author has
first been obtained. Should the play fail in
New York City and on the road it is agreed be-
tween both parties it shall be released for
stock.

TWELTH: Whenever the play is released for
Stock the royalties received from the Stock
Theatres to be divided equally between the party
of the first part and the party of the second
part.

THIRTEENTH: This agreement is binding 50
upon the parties hereto, upon their heirs, ex-
ecutors, assigns, administrators and suc-
cessors.

IN WITNESS WHEREOF the parties hereto
have hereunto set their hands and seals the
day and year first above written.

In the presence of

.....

.....

51

J. HARTLEY MANNERS (L.S.)
OLIVER MOROSCO (L.S.)

It is further agreed that after Miss Taylor
shall have finished her season in 'Peg O' My
Heart' as provided for in this contract, her
successor in the role of 'Peg' for any subse-
quent tours shall be mutually agreeable to both
parties to this contract.

J. HARTLEY MANNERS,
OLIVER MOROSCO."

Bill of Complaint.

52 TWENTY-THIRD: That at the time of the granting of the said license, the said defendant had a theatre in Los Angeles, California, known as the Burbank Theatre, in which he gave productions of plays with a company of actors, for a short run.

53 That under and pursuant to said license, the defendant did perform the said play "Peg O' My Heart" at the said Burbank Theatre, Los Angeles, California, on the 28th day of May, 1912, and the play ran at said theatre for ten weeks. That the leading character, "Peg O' My Heart," in the said play was performed by Laurette Taylor, and the company of actors giving the performance was rehearsed by complainant. The play met with great success, and was brought to New York, and opened at the Cort Theatre, in the City of New York (Borough of Manhattan), where it ran continuously for a period of seventy-four weeks and two days with great success, the principal part being played by Laurette Taylor.

54 TWENTY-FOURTH: That because of the great success of the said play, which ran continuously at one theatre in the City of New York, to wit, the Cort Theatre, from December 20, 1912, to May 30, 1914,—making a total of 604 continuous performances—in order to secure, within the period of five years (the term of his contract) the profits to be derived from producing the play throughout the United States, which territory could not be covered by one company within the unexpired term of the license of the defendant (following the close of the performances at the Cort theatre in May, 1914), the license to defendant was, at his request, modified on or about the 20th day of July, 1914, so as to permit defendant to produce the said play with more than one company, in order that differ-

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ent companies may represent the play at the same 55
time in different parts of the country. That the
agreement of July 20, 1914, modifying the said
agreement of January 19, 1912, is as follows:

"WHEREAS J. Hartley Manners, of the City,
County and State of New York, party of the
first part hereto, and Oliver Morosco, of Los
Angeles, California, party of the second part
hereto, have heretofore entered into an agree-
ment, dated January 19th, 1912 (hereinafter
called 'Original Agreement') a copy of which
is hereto attached, and by express reference
thereto made a part hereof; and contro- 56
versies have arisen and now exist between
the parties hereto with reference to the mean-
ing of said Original Agreement, and the par-
ties hereto desire to settle and adjust said
controversies, and to change said Original
agreement as hereinafter set forth;

Now, THEREFORE, in consideration of the
premises, and good and valuable considera-
tion moving from each of the parties hereto
to the other, the receipt whereof by the
parties hereto is hereby respectively ac-
knowledgeed, the parties hereto do hereby en- 57
ter into this Supplemental Agreement:

FIRST: The parties hereto do hereby set-
tle and adjust all of said controversies.

SECOND: Said Original Agreement, ex-
cept as by this Supplemental Agreement
changed, is hereby in all respects ratified,
confirmed and approved.

THIRD: Paragraphs 'Sixth' and 'Eighth'
of said Original Agreement, and also the ad-

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58 addendum or postscript to said Original Agreement (which addendum or postscript bears the signatures of said Manners and said Morosco) are each and all hereby cancelled and eliminated from said Original Agreement.

FOURTH: There shall be and there is hereby added to said Original Agreement, the following, to be designated as new paragraph 'Sixth' thereof:

59 'Said Morosco may, contemporaneously, and from time to time, as long as this contract is in force, produce, perform and represent said play 'Peg O' My Heart,' with or in as many companies in the United States and Canada as he, the said Morosco, may, in his sole discretion, deem proper; and it is further agreed that Laurette Taylor (Laurette Taylor Manners) need not be engaged to appear and need not appear in the title role or star or principal part, or any other part in any of said companies, and that the said Morosco need in no way consult or confer with the said J. Hartley Manners respecting the star, the cast, the featured member or
60 members of the cast, the rehearsals, or production of said play by any of said companies—of all of which the said Morosco shall have, and is hereby given, sole and exclusive charge and control.'

FIFTH: There shall be, and there is hereby, added to said Original Agreement, to be known as new paragraph 'Sixth-a' the following:

'Said Morosco shall use reasonable efforts to direct that all advertising matter in the

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United States and Canada shall contain a reference to the fact that said Laurette Taylor was the creator of the role of 'Peg' in said play; it being the intention of this provision that said Morosco shall use reasonable endeavors to have said Laurette Taylor's name featured in the manner above indicated, but it being expressly understood and agreed that said Morosco shall have the unlimited right and privilege to feature, star, and advertise any other person or persons appearing or to appear in any of said companies, in any manner that he, said Morosco, shall deem fit or proper.' 61 62

SIXTH: There shall be, and there is hereby, added to paragraph 'Fourth' of said Original Agreement, the following provision:

'The royalties herein specified shall be paid to the said Manners by said Morosco at the rate herein set forth, for every company performing the said play of 'Peg O' My Heart' in the United States or Canada, under the management of said Morosco, under said Original Agreement or this Supplemental Agreement.' 63

SEVENTH: It is further agreed that paragraph 'Eleventh' of said Original Agreement shall be, and the same is hereby, amended so as to read as follows:

'ELEVENTH: Said Morosco is hereby expressly authorized to lease, sub-let, assign, transfer, or sell, to any person or persons, firm or corporation, whatsoever, any of his rights acquired under said Original Agree-

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64 ment or this Supplemental Agreement; it being expressly understood and agreed that no such leasing, sub-letting, assignment, transfer, or sale shall in any way release or discharge said Morosco from his personal liability to pay to said J. Hartley Manners the royalties in amounts, manner, and at the time, as specified in said Original Agreement and in this Supplemental Agreement.'

65 EIGHTH: It is further agreed that paragraph 'Twelfth' of said Original Agreement shall be and the same is hereby amended, so as to read as follows:

66 'TWELFTH: Said play 'Peg O' My Heart' may be released for stock, in the United States and Canada, during the time that this contract is in force, whenever the net amount realized from all the companies producing the play in any one theatrical season shall yield a net profit of less than two thousand (\$2,000) dollars. Whenever the said play is released for stock company or companies, the royalties received from the stock theatres shall be divided equally between the said J. Hartley Manners and said Morosco as and when received by said Morosco.'

NINTH: It is further agreed that during the period of four years from and after the date hereof, neither party hereto shall or will, without the written consent of the other party hereto first had and obtained, directly or indirectly, produce, represent, or exhibit, or permit, allow or suffer to be produced, represented, or exhibited, or sell, lease, give or transfer, any permission, privilege or right

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to produce, represent or exhibit, the said play by cinematograph or motion or moving pictures in the United States or Canada. It is further expressly understood and agreed that after the expiration of said four-year period, the rights, whatever they may be, of either said Morosco or said J. Hartley Manners, to directly or indirectly produce, represent or exhibit, or permit, allow or suffer to be produced, represented or exhibited, or sell, lease, give or transfer, any permission, privilege or right to produce, represent or exhibit the said play by cinematograph or motion or moving pictures in the United States or Canada, shall be such as said Morosco and said J. Hartley Manners shall respectively be legally entitled to under and pursuant to the terms of said Original Agreement, to the same extent and with the same effect as though this Supplemental Agreement had not been entered into. This provision is not to be construed as a recognition by either party hereto that the other had, under the Original Agreement, or has, under this Agreement, the right to give or authorize the giving of cinematograph or motion or moving pictures of said play.

TENTH: The said J. Hartley Manners and the said Morosco hereby forever mutually release the one the other from any and all claims and demands which either one now has or asserts, or might have or assert, against the other, for or on account of any alleged violation of said Original Agreement, on the part of either of the parties hereto, prior to the execution of this Supplemental Agreement;

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70 provided, however, that said Morosco shall and will pay to said J Hartley Manners, on or before July 31st, 1914, any and all unpaid royalties which said J. Hartley Manners shall be entitled to receive from said Morosco under said Original Agreement and this Supplemental Agreement.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals, in original duplicate, at the City of New York, this 20th day of July, 1914.

71 J. HARTLEY MANNERS (Seal)
 OLIVER MOROSCO (Seal)"

TWENTY-FIFTH: That thereupon said Morosco organized eight different companies and performed the play with said theatrical companies playing in different parts of the United States and Canada, during the theatrical season of 1914-1915, giving 2,172 performances; in the theatrical season of 1915-1916, defendant had four different companies giving performances of the play in different parts of the country, representing the play 547 times; and in the theatrical season of 72 1916-1917, defendant had five different companies performing the play in different parts of the country, giving 888 performances. During said theatrical seasons of 1914-1915, 1915-1916 and 1916-1917, the said defendant sent out in all seventeen companies producing the play, and it was performed by said companies in practically every city of the United States in which the play could be performed with any prospect of profit to defendant. That the profits to defendant, derived from performances given, have been very large, amounting, as your orator alleges upon infor-

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mation and belief, approximately to one mil- 73
lion dollars.

TWENTY-SIXTH: That the term of the said contract with defendant and his license to produce said play has expired.

TWENTY-SEVENTH: Your orator further complains and avers that the said defendant, in violation of his said license, did give and authorize the giving, during the theatrical season of 1917-1918, performances of the said play "Peg O' My Heart", by a traveling stock company known as the Joseph W. Payton Repertoire Company. That the said Joseph W. Payton Repertoire Company is what 74
is known in the theatrical profession as a traveling stock company producing plays released to stock theatres, and which said repertoire or stock company gave performances of the said play "Peg O' My Heart" in theatres in which the highest price for orchestra seats charged was fifty cents, and charging as low as ten cents for second balcony or gallery seats. That defendant did not pay complainant one-half of the royalties or compensation received by him from said performances given by said repertoire or stock company. That the profits 75
of the said Morosco during no one theatrical season were less than \$2,000.

TWENTY-EIGHTH: That the said defendant further violated and disregarded the terms of his said license in using and permitting to be used advertising and printed matter in connection with advertising the said play, without mentioning the name of your complainant as the author of the said play, as he was required to do by the terms of his said license.

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76 **TWENTY-NINTH:** Your orator further complains and avers that notwithstanding the premises, and the expiration of the term of the said license, and the violations and disregard of the rights of your orator, said defendant has notified your complainant that he intends to perform and represent, and authorize others to perform and represent upon the stage, the said dramatic composition "Peg O' My Heart" as a motion picture photo-play, under the said title, and authorize others to represent and perform the same as a motion picture photo-play under said title, within the Southern District of New York, and elsewhere throughout the United States, without the consent, license or permission of complainant, and against his protest.

77

THIRTIETH: Your orator further complains and says that the said dramatic composition readily lends itself to a stage representation and performance of the same by means of motion pictures, and that the said dramatic composition, as a photo-play performance and representation upon the stage, by means of motion pictures, is exceedingly valuable, and your complainant has

78 been offered large sums for the right to produce and represent upon the stage, the said dramatic composition, by means of motion pictures or as a photo-play.

THIRTY-FIRST: That a motion picture performance of a dramatic composition is given with scenery and costumes, by a company of actors before a high-speed camera, and thereupon from the negative films there are printed positive films, which positive films are exhibited upon a screen by means of a projecting machine, in theatres and

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places of entertainment, to which the audience is invited for a specified price of admission, the prices varying according to the location of the seats. That the story told by this method is the same story as told when the play is performed by living actors and actresses, and told in the same order and sequence. That performances of motion pictures or photo-plays are given in theatres throughout the United States, for which an admission is charged, and the public is invited to witness a stage performance and representation by means of motion pictures or as a photo-play, of the play advertised or announced for performance; that large revenues are derived from motion picture performances and stage representations of photo-plays, and in the various cities of the United States there are motion picture theatres devoted exclusively to stage performances and representations of photo-plays. That one of the most valuable assets possessed by an author or proprietor of a successful dramatic composition is the right to perform and represent the same and authorize others to perform and represent the same as a photo-play or by means of motion pictures, and as hereinbefore stated, the right to present and authorize others to present said dramatic composition "Peg O' My Heart" as a motion picture or photo-play, possessed by your complainant, is of great value.

That at the time the said license was granted to the defendant in January, 1912, the manufacture of motion pictures was a well-known industry, and plays had been and were then being produced and performed by means of motion pictures or as photo-plays. The motion picture industry was well known to authors and producers of plays and managers and proprietors of theatres.

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82 That at said time, in making contracts or granting licenses to produce a play, if it was intended to include the right to make a production by means of motion pictures, it was the custom in the theatrical profession to expressly mention motion picture rights, and it was also the custom to make special provision in respect of the royalties or payments to be made to the author or proprietor of a play or licensor for the motion picture rights, which royalties were entirely different from and computed upon a different basis than the royalties for the right or license to produce the play by living actors.

83 That the royalties paid to an author, proprietor or licensor for the right to produce the play by living actors was in January, 1912, and at the present time, is vastly different from the royalties that are paid in respect of the license or right to produce the same play by means of motion pictures in motion picture theatres. That in spoken drama, the producer of a play or licensee organizes his own company and furnishes the entertainment in theatres, and the gross receipts taken in are divided between the producer of the play and the proprietor or manager of the theatre in certain
84 agreed proportions, depending upon the character of the attraction and the theatre and the city in which the theatre is located.

That in January, 1912, and since it has been the custom to fix an author's royalties, where the license is given to produce a play in spoken drama, by a certain percentage of the gross receipts taken in at the theatre where the play is being produced.

That in respect of the right to produce a play by means of motion pictures, there was in January, 1912, and is at the present time, a custom in the

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theatrical profession to regulate the royalties paid 85
 to an author, proprietor or licensor on an entirely
 different basis than that of a spoken drama. That
 in the motion picture industry, the manufacturer
 of the picture, through a distributing agency, leases
 to motion picture theatres a positive film for the
 motion picture production, and the proprietor of
 the motion picture theatre pays a fixed sum for each
 day's use of the film, paying from five dollars to
 one hundred and fifty dollars a day, or more, for
 the use of the film. In theatres, in small cities, the
 charge may be five dollars a day, but in large cities
 and in larger theatres, the charge may be as high 86
 as one hundred and fifty dollars a day, or more,
 for the use of the film, for what is known as the
 "first-run" of the picture.

That with very few exceptions, the manufacturer
 of the film or distributing agency has no in-
 terest whatever in the receipts, and does not
 share in the receipts. That the usual arrange-
 ment made and which has been the custom, prior
 to and since January, 1912, is to pay the author,
 proprietor, or licensor, either an agreed sum for
 the motion picture rights of the play, or a fixed
 sum, together with a percentage of the profits
 made by the manufacturer of the picture, but not 87
 a royalty based upon the gross receipts taken in
 from each performance of the play at each theatre
 giving a motion picture performance, or using
 one of the positive films of the photo-play leased
 by the motion picture manufacturer or its dis-
 tributing agency; nor does the theatre furnish
 to the motion picture manufacturer or licensor a
 box office statement of the receipts taken in at
 the theatre.

THIRTY-SECOND: Your complainant further shows
 that if the said defendant is permitted and al-

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- 88 lowed to give and authorize others to give motion picture performances of the said dramatic composition "Peg O' My Heart" without the consent, license, authority or permission of your complainant, and continues to advertise his intention to produce and license others to produce the play as a photo-play or by means of motion pictures, it will irreparably injure the value of complainant's right in and to the said dramatic composition "Peg O' My Heart" and the right to produce and represent and authorize others to produce and represent the same upon the stage as a photo-play or by means of motion pictures, and will
- 89 break down the exclusive right which complainant has in and to said dramatic composition, and in and to the exclusive right to perform and represent the same and authorize others to perform and represent the same as a photo-play, or by means of motion pictures, or otherwise, and break down and destroy the exclusive right which complainant has to represent and authorize others to represent the said play "Peg O' My Heart" upon the stage.

- THIRTY-THIRD: That the acts of the defendant in publicly announcing in the public press and otherwise that he will produce and represent, and
- 90 license others to produce and represent the said dramatic composition "Peg O' My Heart" as a photo-play and upon the stage, is causing great injury and damage to the business and profits of your complainant.

THIRTY-FOURTH: That theatrical managers and producers of motion pictures will not deal with one who has not the exclusive right to give and authorize the giving of motion pictures, nor will they pay the value of a motion picture right to

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one who is not the exclusive owner of such right 91
in the play and cannot protect the theatrical manager or producer in such exclusive right to the performance, and the acts of the defendant hereinbefore referred to have led theatrical managers and producers of motion pictures and purchasers of motion picture rights to refrain from continuing negotiations or dealing with your complainant for the right to produce said dramatic composition "Peg O' My Heart", as a photo-play.

That the injury and damage caused by the wrongful acts of the defendant hereinbefore referred to, cannot be accurately ascertained and 92
computed, and adequate compensation therefor cannot be made in any action at law; that no damages recoverable in an action at law will afford complainant adequate relief, and the damages which may be suffered by the complainant are not capable of exact estimation or calculation and are irreparable.

THIRTY-FIFTH: That the value to your complainant in the said dramatic composition consists in the fact that he has the exclusive right to produce and license others to produce the play upon the stage, and that he can be protected by the courts 93
in such exclusive right, and if the defendant or any other person should represent the play as a photo-play or otherwise, without the consent, license or permission of your complainant, it will irreparably injure him in his business and rights, and he will suffer great and irreparable loss and pecuniary damage.

All of which things and acts, doings and productions are contrary to equity and good conscience, and tend to the manifest wrong and injury to your orator.

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- 94 In consideration thereof, and inasmuch as your orator can only have relief in the premises in this Honorable Court, where matters of this nature are properly cognizable, complainant prays that the defendant be required to make true, full and perfect answers to all and singular the matters hereinbefore stated and charged (but not under oath) as fully and particularly as if the same were here repeated, and that the defendant be decreed to render a full and true account to your complainant of all moneys and profits derived from or by reason of any performance given by
- 95 him, or any of his licensees, in violation of the rights of your complainant, and that the defendant, his agents, servants, licensees and employees, and any and every person acting under his direction, control or permission, be restrained and enjoined, pending the action, and thereafter perpetually, from playing, producing, exhibiting upon the stage, printing, publishing, translating, copying, adapting, advertising, or causing or licensing to be produced, represented, played, exhibited, printed, published, translated, copied, adapted or advertised, or otherwise exercising or assuming to exercise or causing to be exercised,
- 96 or assuming any control, ownership or dominion of, in, to or over the dramatic composition or book entitled "Peg O' My Heart", or any of its scenes, incidents, plot, story or any simulation or colorable imitation or adaptation of the said dramatic composition or book, under the title of "Peg O' My Heart", or otherwise, and from representing or performing or authorizing others to represent or perform, or to advertise any play or dramatic composition under the said title of "Peg O' My Heart", and from manufacturing, making, advertising, exhibiting, performing or

Bill of Complaint.

representing or causing or authorizing to be manufactured, made, printed, advertised, exhibited, performed or represented, as a motion picture or photo-play the said dramatic composition or book entitled "Peg O' My Heart", or any of its scenes, incidents, plot or story, or any simulation, imitation or adaptation of the said dramatic composition or book under the said title of "Peg O' My Heart", or otherwise. 97

That the defendant be compelled, by a decree of this Honorable Court, to account to complainant for all infringing motion picture films made, manufactured or possessed by him, or at any time in his possession, or those of any of his licensees or assignees, and to account for and pay over unto complainant all such gains and profits as have accrued to or have been derived by or received by the defendant, and all such gains and profits as complainant would have received but for said wrongful acts and conduct of the defendant, and pay all damages that complainant has sustained, or in lieu of actual gains and profits, such damages as to this court may seem just and proper, pursuant to the Acts of Congress in such case made and provided. 98

And that, in order that your complainant may have such other relief as may be just, may it please your Honor to grant unto your complainant a writ of subpoena of the United States of America, issued out of and under the seal of this Honorable Court, directed to the said defendant, Oliver Morosco, commanding him on a day certain to be therein named, and under a certain penalty to be and appear in this Honorable Court and make answer to this bill of complaint, and to stand to and perform and abide by such further 99

Bill of Complaint.—“Exhibit 2.”

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“Exhibit 2.”

Copyright office of the Library of Congress
United States of America, Washington, D. C.

CERTIFICATE OF COPYRIGHT REGISTRATION

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This is to Certify, (In conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913), that two copies of the BOOK named herein have been deposited in this Office under the provisions of the Act of 1909, together with the affidavit prescribed in section 16 thereof; and that registratrion of a claim to copyright for the first term of twenty-eight years from the date of publication of said book has been duly made in the name of Dodd, Mead and Company, claimant of copyright, whose address is 443 Fourth Ave., New York, N. Y.; the title of the book registered is Peg O' My Heart. A comedy of youth. By J. Hartley Manners. This novel is founded by Mr. Manners on his play of the same title. Illustrations by Martin Justice. New York: Dodd, Mead and Company, 1913; the author is a citizen of United States; the date of publication is October 30, 1913; the date of the completion of printing is October 16, 1913; the affidavit was received November 4, 1913, and registration has been made as Class A, XXc., No. 358083.

(Seal) THORVALD SOLBERG,
Register of Copyrights.

Bill of Complaint.—“Exhibit 3.”

“Exhibit 3.”

109

WHEREAS, J. Hartley Manners composed, wrote and originated a play called “Peg O’ My Heart”, which play has been and is in manuscript form; and

WHEREAS, the said J. Hartley Manners (hereinafter called “Author”) did enter into an agreement on the 19th day of February, 1913, with Dodd, Mead & Company (hereinafter called “Publishers”), whereby the Author authorized the Publishers to publish, in novelized form, the said play “Peg O’ My Heart”; the said Author, however, reserving the rights of translation and of dramatization and serialization; and

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WHEREAS, the said Publishers duly published in the United States a novelization of the play, under the said title “Peg O’ My Heart”, and did duly comply with the provisions of the United States Copyright Code of 1909, entitled “An Act to Amend and Consolidate the Acts respecting Copyrights”, and did duly comply with all the provisions of the said Act, with respect to the deposit of copies and registration of such work, and the giving of the notice of copyright, as provided in and by said Act, and in all other respects;

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NOW, THEREFORE, in consideration of the premises, and of the sum of one dollar, paid by the Author to the Publishers, receipt whereof is hereby acknowledged, the Publishers (Dodd, Mead & Company) do hereby sell, assign, transfer and set over unto the Author (J. Hartley Manners) for himself, his executors, administrators, heirs and assigns, the sole and exclusive right to translate the said copyrighted work into other languages or dialects, and to make any other version thereof; also the exclusive right to dramatize the said copyrighted work; also the exclusive right to perform or represent the copyrighted work publicly in any manner and by any method by which the said copy-

Bill of Complaint.—“Exhibit 3.”

112 righted work may be exhibited, performed, represented, produced or reproduced, and the exclusive photo-play and motion picture right and right to exhibit, perform, represent, produce or reproduce the said copyrighted work, or any dramatization thereof, by means of motion pictures, and to authorize and license others so to do, with the right to print, reprint, publish, copy and vend any of said translations, dramatizations, photo-play or motion picture, or the serializations of the said copyrighted work.

113 IN WITNESS WHEREOF, the said Publishers (Dodd, Mead & Company) have hereunto set their hands and seals, this 27th day of December, 1916.

DODD, MEAD & CO. INC.

(Seal)

By EDW. H. DODD, President.

In presence of:

I. F. GRAHAM

342 W. 16th St.

MILES W. NOURSE

443 4th Ave.

N. Y. City.

114 UNITED STATES OF AMERICA, }
City, County & State of New York, } ss.:

On this 11th day of January, 1917, before me personally came EDW. H. DODD, to me known, who being by me duly sworn, did depose and say: That he resides in New York City; that he is the president of Dodd, Mead & Co. Inc., the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of its board of directors, and that he signed his name thereto by like order.

HENRY J. DAUSER,

(SEAL)

Notary Public, Queens Co., N. Y.

Bill of Complaint.—“Exhibit 3.”

The Act of March 4, 1909, sec. 44, provides: “That every assignment of copyright shall be recorded in the Copyright Office within *three calendar months* after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded.

A. COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA 115

LIBRARY OF CONGRESS—WASHINGTON

The foregoing assignment of copyright, dated December 27, 1916, and received for record in the Copyright Office on January 15, 1917, has been recorded in the Copyright Office, book 67, pages 188-189, in conformity with the laws of the United States respecting copyrights.

IN WITNESS WHEREOF, the seal of this Office has been hereto affixed this seventh day of February, 1917. 116

(SEAL)

THORVALD SOLBERG,
Register of Copyrights.

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Answer.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,

AGAINST

OLIVER MOROSCO,
Defendant.

Answer.

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OLIVER MOROSCO, a citizen of the United States of America, domiciled in the Borough of Manhattan, City of New York, State of New York, by his attorney, William Klein, answers the complaint of the plaintiff herein as follows:

AS TO THE FIRST CAUSE OF ACTION:

I. This defendant denies, upon information and belief, each and all of the allegations contained in paragraph First of the complaint herein.

120 II. As to each and all of the allegations in paragraphs Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth of the complaint contained, this defendant denies any knowledge or information thereof sufficient to form a belief.

III. As to the allegations of paragraph Twelfth of the complaint, this defendant denies that he has done or is doing any wrongful acts whatsoever, and denies that he plaintiff has any rights in the dramatic composition "Peg O' My Heart," other than such as have been reserved to him in the two

Answer.

agreements expressly set forth in paragraphs Twenty-second and Twenty-fourth of the complaint herein. 121

IV. As to the allegations in paragraph Thirteenth of the complaint herein that the plaintiff has been offered large sums for the right to produce and represent upon the stage the said dramatic composition, "Peg O' My Heart," by means of motion pictures as a photo-play, this defendant denies any knowledge or information thereof sufficient to form a belief.

V. As to the allegations in paragraph Fourteenth of the complaint that one of the most valuable assets possessed by an author or proprietor of a successful dramatic composition is the right to perform and represent the same, and authorize others to perform and represent the same as a photo-play or by means of motion pictures, this defendant denies any knowledge or information thereof sufficient to form a belief. 122

VI. This defendant denies each and all of the allegations contained in paragraphs Sixteenth, Seventeenth, Eighteenth and Nineteenth. 123

AS TO THE SECOND CAUSE OF ACTION:

VII. With reference to the paragraphs of the complaint herein numbered First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth, this defendant now reiterates the admissions and denials with reference to the allegations of the said paragraphs heretofore alleged in connection with the first alleged cause of action in the said complaint.

Answer.

124 VIII. With reference to the allegations in paragraph Twenty-fourth of the complaint, this defendant denies that the modified agreement was made at his request. On the contrary, it was made for the mutual advantage of the plaintiff and the defendant. This defendant also denies that he was actuated in the making of such modified agreement by any desire to secure an opportunity to produce the said play throughout the United States of America within any period of five or other definite period of years, and denies that the term of the contract set forth in paragraph Twenty-second of the complaint is five or any other definite number of years. The defendant contends that by his said contract he had an absolute and unlimited grant of the rights to produce and represent the said play except as therein expressly limited.

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IX. This defendant denies absolutely each and all of the allegations contained in paragraph Twenty-sixth of the complaint.

X. With reference to the allegations of paragraph Twenty-seventh of the complaint, the defendant admits that the profits of the play during no one theatrical season has been less than \$2,000, and admits that he did not pay the plaintiff one-half of the royalties paid to him by the Joseph W. Payton Repertoire Company, inasmuch as he was not required to do so by his contract with the plaintiff. As to each and all of the other allegations of paragraph Twenty-seventh of the complaint, this defendant denies the same.

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XI. This defendant denies each and all of the allegations contained in paragraph Twenty-eighth of the complaint.

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XII. With reference to the allegations in paragraph Thirtieth of the complaint, that the plaintiff has been offered large sums for the right to produce and represent the said play upon the stage, this defendant denies any knowledge or information thereof sufficient to form a belief. 127

XIII. With reference to the allegations in paragraph Thirty-first to the effect that one of the most valuable assets possessed by an author or proprietor of a successful dramatic composition is the right to perform and represent the same, and to authorize others to perform and represent the same as a photo-play or by means of motion pictures, this defendant denies any knowledge or information thereof sufficient to form a belief. This defendant further denies the allegation in the said Thirty-first paragraph of the complaint that the plaintiff possesses or did possess at any time since the execution of the said contract set forth in paragraph Twenty-second of the complaint, the right to present or authorize others to present the said play in motion pictures. This defendant further denies the allegation in paragraph Thirty-first that in January, 1912, the manufacture of motion pictures was a well-known industry; and the allegation that at that time (or for that matter at any time since) in making contracts or granting licenses to produce a play, if it was intended to include the right to make a production by means of motion pictures, it was the custom in the theatrical profession to expressly mention motion picture rights; and the allegation that it was the custom to make special provision in respect of the royalties or payments to be made to the author or proprietor of a play or licensor for the motion picture rights. This defendant also denies, on information and belief, the al- 128 129

Answer.

- 130 legation in paragraph Thirty-first of the complaint that the royalties for motion picture rights were entirely different from and computed upon a different basis than the royalties for the right or license to produce the play by living actors, and that the royalties paid to an author, proprietor or licensor for the right to produce the play by living actors was, in January, 1912, and at the present time is, vastly different from the royalties that are paid in respect of the license or right to produce the same play by means of motion pictures in motion picture theatres. This defendant alleges that the matter of compensation in such cases is generally a
- 131 matter of special agreement and depends upon the particular facts of each particular case. This defendant further denies, upon information and belief, the allegation in paragraph Thirty-first of the complaint, that in January, 1912, and since it has been the custom to fix an author's royalties, where the license is given to produce the play in spoken drama, by a certain percentage of the gross receipts taken in at the theatre where the play is being produced; and this defendant denies generally the allegations in the said paragraph concerning the alleged custom and practice for the regulation of
- 132 the payment of royalties and the division of the receipts between author, producer and licensor.

This defendant further denies, on information and belief, each and all the following allegations in paragraph Thirty-first of the complaint:

That with very few exceptions, the manufacturer of the film or distributing agency has no interest whatever in the receipts, and does not share in the receipts. That the usual arrangement made and which has been the custom, prior to and since January, 1912, is to pay the author, proprietor, or licensor, either an agreed sum for the motion picture

Answer.

rights of the play, or a fixed sum together with a percentage of the profits made by the manufacturer of the picture, but not a royalty based upon the gross receipts taken in from each performance of the play at each theatre giving a motion picture performance, or using one of the positive films of the photo-play leased by the motion picture manufacturer or its distributing agency; nor does the theatre furnish to the motion picture manufacturer or licensor a box office statement of the receipts taken in at the theatre. 133

XIV. This defendant denies each and all of the allegations contained in paragraphs Thirty-two, Thirty-three, Thirty-four and Thirty-five of the complaint. 134

FOR A SEPARATE AND AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES AS FOLLOWS:

XV. On or about the 19th day of January, 1912, the plaintiff and this defendant made a written contract, a copy of which is set forth in paragraph Twenty-second of the complaint.

XVI. On or about July 20, 1914, the plaintiff and the defendant modified the said contract by the execution of a supplemental contract, a copy of which is set forth in paragraph Twenty-fourth of the complaint. 135

XVII. The said contract of January 19, 1912, as modified by the said supplemental contract of July 20, 1914, is still in full force and effect; and this defendant has fully and duly performed all the conditions thereof on his part to be performed.

Answer.

136 XVIII. Since the execution of the said contracts, this defendant at all times has had and now has the sole and exclusive license and liberty to produce, perform and represent the said play, "Peg O' My Heart" in the United States of America and the Dominion of Canada, including the sole and exclusive license and liberty to produce and represent the same in motion picture or photo-play form.

137 XIX. The defendant has produced at least seventy-five performances of the said play during each and every theatrical season since December 20, 1912.

XX. Under the said contract and supplemental contract the only right which the plaintiff has to terminate the rights of the defendant thereunder is, as expressed in paragraph Fifth of the said contract of January 19, 1912, to wit:

138 "Fifth: The said party of the second part further agrees that if during any one theatrical year, such year to begin on the first day of October, said play has not been produced or presented for seventy-five performances then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part."

Inasmuch as the defendant has in all respects complied with the condition of said paragraph, the plaintiff has not the right to maintain this action against the defendant.

Answer.

WHEREFORE, this defendant demands that the 139
complaint be dismissed with the costs and dis-
bursements of this action.

OLIVER MOROSCO
Defendant.

WILLIAM KLEIN,
Solicitor for Defendant,
CHARLES H. TUTTLE, Esq.,
Of Counsel.

STATE OF NEW YORK, }
County of New York, } ss.:

OLIVER MOROSCO, being duly sworn, deposes and 140
says: that he is the defendant in the above entitled
action; that he has read the foregoing answer and
knows the contents thereof, and that the same is
true to his own knowledge, except as to the matters
therein stated to be alleged on information and be-
lief and as to those matters he believes it to be true.

OLIVER MOROSCO.

Sworn to before me this 20th }
day of September, 1918. }

EMANUEL M. KLEIN

Notary Public,

New York County.

[SEAL]

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

J. HARTLEY MANNERS,
Plaintiff

vs.

OLIVER MOROSCO,
Defendant

In Equity 15-214

143

NEW YORK, Tuesday, November 19, 1918

Before—Hon. JULIUS M. MAYER,
District Judge

APPEARANCES:

W. C. NOYES, Esq., and
DAVID GERBER, Esq., For Plaintiff

WILLIAM KLEIN, Esq., and
CHARLES A. TUTTLE, Esq., For Defendant.

Plaintiff's Prima Facie Proofs.

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JOHN HARTLEY MANNERS, a witness called in behalf of the plaintiff, being duly sworn, testifies as follows:

DIRECT-EXAMINATION BY MR. GERBER:

Q. 1. Mr. Manners, you are a subject of Great Britain and Ireland? A. I am.

Q. 2. You have been a resident of the United States for how many years? A. Since December, 1902.

Q. 3. Residing here continuously from that date

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on? A. With the exception of sixteen months in 145
1914 and 1915 I was in England.

Q. 4. Just paying a visit? A. I was producing
Peg O' My Heart.

Q. 5. You are a playwright? A. Yes.

Q. 6. What plays have you produced?

Mr. Tuttle: I object to that.

Objection sustained.

Mr. Gerber: Would it not be proper on the
question of his knowledge regarding the con-
dition of the motion picture industry in 1912?

The Court: I do not think so.

146

Exception by plaintiff.

Q. 7. Did you write "Peg O' My Heart"? A.
Yes.

Q. 8. That was an original production? A. It
was, yes.

Q. 9. I show you a printed copy of that dramatic
composition and ask you if that is the printed copy
of "Peg O' My Heart"? A. It is.

Mr. Gerber: I offer that in evidence.

Mr. Tuttle: I do not see, your Honor, the
object of incumbering the record with that.
The contents of the book is not a matter in issue 147
in any form, shape or manner, whether the play
is in English or French or any other language
is of no importance.

The Court: Suppose you concede the formal
facts.

Mr. Tuttle: I concede this is Mr. Manners
who wrote the play.

The Court: And also that the play was for
the purposes of this litigation duly and prop-
erly copyrighted?

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148 Mr. Tuttle: They copyrighted the book in 1918.

The Witness: The book was copyrighted in 1914.

Mr. Tuttle: There was another copyright in 1913 which was one year after the original contract was made. Now, the question is what has been granted to us? He may have copyrighted the play fifty times over before as well as after. If, however, he granted us certain rights the copyright matter has nothing to do with it.

149 The Court: Mr. Gerber just wants to make sure his jurisdiction is all right.

Mr. Gerber: That is all.

The Court: I will receive it.

Marked Plaintiff's Exhibit 1.

Mr. Gerber: I offer in evidence the certificate of copyright from the Register of Copyrights.

Marked Plaintiff's Exhibit 2.

I offer in evidence the certified copy of the application for registration dated July 18, 1918.

150 Marked Plaintiff's Exhibit 3.

Q. 10. I show you what purports to be a book of "Peg O' My Heart" and ask you if that is "Peg O' My Heart" in novelized form? A. It is.

Mr. Gerber: I offer that in evidence.

Mr. Tuttle: I renew my objection.

The Court: I do not see what this has got to do with it.

Mr. Gerber: For this reason, on the question largely of jurisdiction here. The book was copyrighted in 1913, and all the dramatic rights were reserved to Mr. Manners by the publisher.

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I do not say that it is essential for the jurisdiction of the Court, nor do I say it is essential on this contract, but I think it is part of the history of this case in order to show proper copyrights. 151

The Court: Objection sustained; it may be marked for identification.

Marked Plaintiff's Exhibit 4 for identification.

Exception by plaintiff.

Mr. Gerber: I offer in evidence the certificate of copyright of this book which has been marked for identification. 152

Same objection, ruling and exception.

Marked Plaintiff's Exhibit 5 for identification.

Mr. Gerber: I offer in evidence assignment of Dodd, Mead & Company to J. Hartley Manners bearing date December 27, 1916, of all dramatic and motion picture rights covered by the copyright certificate marked Plaintiff's Exhibit 5 for identification.

Mr. Tuttle: Is that the assignment of the novelized form? 153

Mr. Gerber: Yes.

Mr. Tuttle: I make the same objection.

The Court: I make the same ruling.

Marked Plaintiff's Exhibit 6 for identification.

Exception by plaintiff.

Q. 11. I show you a paper purporting to be a contract bearing date January 19, 1912, between you and Oliver Morosco and ask you whether that bears

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154 your signature and that of Mr. Oliver Morosco?
A. Yes; it does.

Mr. Gerber: I offer the contract in evidence.

Marked Plaintiff's Exhibit 7.

Q. 12. I notice in this contract, Plaintiff's Exhibit 7, reference is made to one Miss Laurette Taylor playing the title role in "Peg O' My Heart". Who is Miss Taylor? A. My Wife.

Q. 13. She is an actress and has been for some years a star actress? A. She has.

Q. 14. I show you what purports to be a contract bearing date July 8, 1912, between Oliver Morosco and Laurette Taylor purporting to be witnessed by you, and ask you whether those signatures are the signatures of Oliver Morosco and Laurette Taylor?
155 A. They are.

Mr. Gerber: I offer this contract in evidence.

Mr. Tuttle: I object to that contract. That contract is between other parties and it is not the subject matter of this suit.

Mr. Gerber: This contract, if your Honor please, is a contract for three years with a right to extend for three years longer and would terminate exactly with the expiration of the contract Plaintiff's Exhibit 7, the first contract introduced.
156

The Court: I do not see that it has got anything to do with the case.

Mr. Noyes: If your Honor please, I would like to say a few words on that. This opens up quite an important question in the case and I think it ought to be presented to your Honor, and now may be as good a time as any time. It is perfectly true that this case depends upon the interpretation of these contracts which have been offered in evidence. The suit is for violation

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of a copyright. The defendant justifies under 157
his contracts. If his contracts give him the
right to do the things we complain of why, that
is a good defense. If they do not, why, it is a
violation of the copyright. This case, as Mr.
Tuttle said, does have two phases; first, we say
as to whether the moving picture rights are
granted, as to that matter I think that we would
not have to go outside the precise terms of the
contracts, which are very clear, and bring us,
as we think, exactly within your Honor's deci-
sion in the Rex Beach case, that the language
of the contract shows that it is limited to a 158
stage production just as clearly as if those
words were expressly stated. The other ques-
tion is whether at the present time Mr. Morosco
has any rights under that contract at all and
that is the question of whether it has expired
or not. Now, that question whether it has ex-
pired or not has two phases; first, whether
there is any time limitation at all, and
secondly, if there is a time limitation, whether
it has run out. Our contention is that this is
not a grant at all, it is a mere license. Your
Honor will notice the first paragraph, while
it does use the word "grant" it says it grants 159
a license, and it is a license, and nothing else.
Now, the rule regarding a license is that it is
revokable at the option of the licensor unless
some time is specified, and if there were nothing
else in the case we might rely on that element-
ary rule. However, the third paragraph says
"The party of the second part agrees to pro-
duce the play not later than January 1, 1913"
and to continue the play, and we say, and shall
claim, I do not intend to argue at any length
now, that that is a reciprocal provision, that

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- 160 the obligation to perform for five years gives the right to perform for five years, and that while we might have said that that was revocable at the option of the lessor yet in view of this provision where there is the time limitation for the duty to perform, that the right to perform is co-extensive. And the fifth provision which has been referred to, as to the minimum number of performances, we say it does not have the effect of having this run indefinitely, but just as to the number of performances required during the five year period.
- 161 Now, while we say, if your Honor please, that the intention is to be governed from the paper itself, while this limitation is to be found by reasonable interpretation in this instrument, yet it may be that it is a case that there is an ambiguity, that the language is uncertain about it so that your Honor would be required to go into the cotemporaneous agreements, and we find that this calls for the employment of Miss Taylor as the star performer in the play, and we have a contract with Miss Taylor for three years plus two years more, or five years which has a bearing, we claim, upon the
- 162 question of the limitation of time; Mr. Morosco claims there is no limitation of time at all. We say that this provision means a limitation of time. This contract provides for the employment of Miss Taylor, and we find the contract being made for Miss Taylor which runs over a five year period, and we think that it will be helpful to your Honor in case your Honor finds there is ambiguity here, and I have assumed that under the circumstances instead of your Honor ruling immediately as to the interpretation of that instrument that your Honor would

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receive this testimony and determine its bearing later on. 163

And there is also a question whether this contract, assuming it has a five year period, whether it ran out in 1918 or 1919. Paragraph 3 is subject to two interpretations. The other side claims that it is not only for the 1913-1914 season but for five years following that. We say the 1913-1914 season is to be calculated, or included, and that the word "thereafter" requires continuous performance. That Paragraph 3, it may be ambiguous and we intend to offer evidence to show the intention of the parties, the conversations, that it would run for five years expiring in June, 1918, and on that point the contemporaneous contract made with Mrs. Taylor which ran out in June, 1918 is important to be considered. It is the practical construction which the party himself, the defendant himself, put upon the instrument, as we say, that when he was to get the services of the star performer, that he employed her for five years, and we say that that indicates that the contract ran for five years. 164

For that reason we intend to offer this testimony and offer other testimony on this. Of course, if we could consider this in an ideal way I suppose your Honor would say "I will consider this carefully, I will make my ruling as to the interpretation to be put upon this provision, if I find that the contract is perfectly clear and unambiguous one way or the other I will not receive it." But I do not suppose this morning with this very slight discussion your Honor could rule that way. It seems to me perfectly clear that the contract should be 165

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166 interpreted as we claim it and yet we must prepare.

167 The Court: I do not think the contract is ambiguous in the legal sense. In other words, I think the contract is in simple language, requires only the construction of the Court, and there are only here very few words of art. For instance, I would take testimony if it was a matter of any consequence upon what is meant by the words "theatrical season" concerning which I have no judicial knowledge, although both counsel said they agreed on that. The rest of it is purely the question of the construction of a written instrument which is, as I say, not ambiguous from my point of view in the legal sense. In the second place, on the question of construction of contract naturally I would take any testimony as to the transaction between Mr. Manners and Mr. Morosco, but the moment you go outside of that, I do not know what motives may have entered in the minds of Miss Taylor and Mr. Morosco, assuming Morosco to have construed the contract as meaning that he was obligated for five years, he made a contract with the star on those lines, 168 which would not necessarily throw any light upon the relations between the defendant and the plaintiff. I will sustain the objection. The paper may be marked for identification.

Mr. Gerber: Would it change your Honor's ruling if it appeared that one of the witnesses to the contract was Mr. Manners and one of the parties Morosco, so that you have the two parties to the contract,

The Court: No; not the slightest.

Marked Plaintiff's Exhibit 8 for identification.

Exception by plaintiff.

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By Mr. Gerber:

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Q. 13. Where were the terms of the contract, Plaintiff's Exhibit 7, discussed between you and Mr. Morosco?

Mr. Tuttle: I object to that.

Objection sustained.

Exception by plaintiff.

Q. 14. What if anything was said in discussing the terms of the contract about to be entered into resulting in the contract Plaintiff's Exhibit 7 respecting the term or duration of the license?

Same objection, ruling and exception.

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Mr. Noyes: Your Honor bears in mind on these two questions, first, as to the five year period, and secondly, as to when that five year period expired. Now, I am frank to say that it seems to me that that third paragraph is ambiguous on the question as to whether that five years is to include the season of 1913-1914 or not.

The Court: To me it is very simple, Judge. The season of 1913-1914 means from September, 1913 to June, 1914. Now, that having been completed, to wit, in June, 1914, you start your calculation of five years from that date because the contract here is perfectly plain when it says "and for each theatrical season thereafter". It means really under that clause that Morosco was obligated for six seasons beyond a shadow of a doubt in my judgment. Suppose the thing had read "Seventy-five performances during the month of September, 1913 and for each September thereafter". That is the same thing. Now, it is true with men quite characteristic of this profession that

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they do a lot of talking with each other and get all sorts of notions in their heads on which they subsequently never agree and the only safe way is to hold them down to the written words.

Mr. Noyes: But the other side claim practically that this runs for seven years.

Mr. Tuttle: No.

Mr. Noyes: You claim it was for part of the season of 1912-1913. You then claim it was for the season of 1913-1914 and then, as I understand it, you claim it is for five years after that, which makes seven seasons.

173

Mr. Tuttle: Mr. Gerber himself said that the year 1913, January, 1913, down to the beginning of the season should be excluded because it was in the middle of the season of 1912-1913.

The Court: The point is that Morosco was to produce the play not later than January 1st. That is, for the performance of his obligation of production he could wait until the 1st of January.

Mr. Noyes: That is the preceding year.

The Court: It says the party of the second part agrees to produce the play not later than January 1, 1913.

174

Mr. Noyes: That is the season of 1912-1913.

The Court: He had no obligation to produce any given number of performances until the season of 1913-1914.

Mr. Tuttle: That is the point.

The Court: Then he obligated himself to these seventy-five performances in the 1912-1913 season which might begin on January 1, 1913. There was no obligation, he could produce it once or one hundred times, but his fixed obligation was the minimum, began September,

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1913 for seasons 1913 to June, 1914 and then 175
it says "and for each theatrical season there-
after".

Mr. Noyes: Let me present this to your
Honor, our view as to that provision, and which
I think your Honor will see that there is at
least an ambiguity there. We say that this
calls for a presentation beginning not later
than January 1, 1913. That is one year, one
theatrical season or a part of it. It might have
begun earlier but it could not be later. Then
there was the seventy-five performances per
year were required, and if your Honor will 176
transpose the words "for five years" to precede
the words "at least" then it would read "to
continue the said play for a period of five years
for at least seventy-five performances during
the season of 1913 for each theatrical season
thereafter". We say that if that were the way
it would be clear that the period in which these
stipulated performances were to be given was
a period of five years and that the word "there-
after" meant that those seasons should follow
one after the other, that they should be con-
tinuous, and it was to prevent any possibility 177
of a claim that they would not be all within
the five year period that we offer to produce
testimony to show that that was the intention
of the parties, and we also offer to show by
this contract with Miss Taylor—

The Court: I appreciate the contention, I
think, perfectly. My point is that there is no
ambiguity from the legal sense any more than
you can say that any contract, any written con-
tract, which requires judicial construction in
respect of plain language colloquated in a
manner which would open an argument for

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178 each side, can be said to be ambiguous, because if such a doctrine were to obtain one would have parol testimony upon almost every contract that finds its way into a court. I will adhere to my decision.

Mr. Gerber: Exception.

Mr. Noyes: Your Honor puts the record in such shape that in case there should be an appeal the Circuit Court of Appeals would have it before them——

The Court: Yes, you have it marked for identification.

179 Mr. Noyes: And we offer to show, if your Honor please, that in conversations between these parties there was a parol understanding that the limitation of this contract should be for five years expiring at the end of the theatrical season of 1918.

Mr. Tuttle: I object to the offer.

The Court: For purposes of brevity counsel's offer may appear in the record.

Mr. Tuttle: I do not object to making the offer; I object to the materiality and substance of it.

180 The Court: I will state for the purposes of clarity on the record that if the witnesses were offered for that purpose I should exclude the testimony on the grounds heretofore stated.

Mr. Gerber: And we except.

The Court: Certainly.

By Mr. Gerber:

Q. 15. Mr. Manners, in this contract, Plaintiff's Exhibit 7, there is some reference to theatrical seasons. What is a theatrical season? A. It was customary to begin on October 1st and end on April 30th in the old days. For the last few years it has

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been extended to the end of May and sometimes 181
into June, but the accepted season would be October
1st to April 30th.

By the Court:

Q. 16. In 1912 what was the accepted season?

A. It would run into May, but as a rule the seasons
closed April 30th.

By Mr. Gerber:

Q. 17. It would run from October of one year
into the May of the following year? A. Yes.

Q. 18. Mr Manners, in July, 1914 there was a 182
meeting, was there not, between yourself and your
counsel, and Mr. Morosco and his counsel, in Chi-
cago? A. There was.

Q. 19. And a paper writing was then signed, was
there not, which I will now show you. I will ask
you whether that is the signature of Mr. Oliver
Morosco? A. It is.

Q. 20. And that is the contract or paper that was
signed in July, 1914 at Chicago? A. Yes; that is
right.

Mr. Gerber: I offer that contract in evidence.

Marked Plaintiff's Exhibit 9.

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Q. 21. Who drew the contract, Plaintiff's Ex-
hibit 7?

Mr. Tuttle: I object to that.

Objection sustained. Exception by plaintiff.

Q. 22. I show you another paper purporting to be
a contract bearing date July 20, 1914 and ask you
if that is Mr. Morosco's signature? A. Yes; it is.

Mr. Gerber: I offer that in evidence.

Mr. Tuttle: I object to that contract. That

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184 has reference to other rights in other places and includes also another play.

Mr. Gerber: It does include one play "Barbaraza" which they cancelled and it does include some other matters which they cancelled, but it embraces also "Peg O' My Heart" for England for a period of three years with an option of three years, made at the same time between the same parties, in July, 1914, in Chicago.

The Court: But the contract under discussion relates solely to the United States and
185 Canada.

Mr. Gerber: Yes.

The Court: Objection sustained.

Exception by plaintiff.

Mr. Gerber: I offer it for identification.

Marked Plaintiff's Exhibit 10 for identification.

Q. 23. How long did "Peg" run in the city of New York? A. It ran from December 20, 1912, to May 30, 1914.

Q. 24. Continuously? A. Continuously.

Q. 25. Who played the star part? A. Laurette
186 Taylor.

Q. 26. Following the execution of the agreement of July 20, 1914, how many companies were put out by Mr. Morosco playing this play?

Mr. Tuttle: It seems to me I ought to object to that.

Mr. Gerber: It would only go to sustain this question of limitation of time, that he was trying to cover the country with a number of companies.

The Court: Objection sustained.

Exception by plaintiff.

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Q. 27. Mr. Manners, in 1912 at the time that Plaintiff's Exhibit 7 was executed was the motion picture industry well known in the theatrical profession? A. Very well known. 187

Q. 28. And were there a number of motion picture theaters throughout the United States devoted exclusively to giving motion picture performances? A. Yes; there were.

Q. 29. In practically all the cities of the United States at that time, is that so? A. I should think so.

Q. 30. You had one of your plays in motion pictures, did you not? A. I did.

Q. 31. That is the "House Next Door"? A. "The House Next Door". 188

Q. 32. In leasing plays for motion pictures was it the custom in 1912 to lease at a fixed rental for the film for the use of it each night?

Mr. Tuttle: I object to that as immaterial and irrevelant, what the custom was in 1912.

Mr. Gerber: Here is a contract that probably would require this evidence in view of your Honor's decision in the other case, here is a contract that calls solely for a royalty basis on gross receipts of the house, and they ask your Honor to construe that to include motion pictures. Now, if in 1912 it was well known that pictures were leased for so much a night would it not have some bearing on the construction of the contract as to whether that does or does not embrace motion pictures? 189

The Court: I think not. Because many people lease motion picture rights upon a certain basis, that does not prove one way or the other that John Doe and Peter Smith could not arrange their own contract.

Mr. Noyes: If your Honor please, that is not

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- 190 quite the ground we are offering this upon. Here is a contract between these parties relating to the production of this play. We say that it is inapplicable, it does not apply to the moving picture industry. It speaks of there being a star. In the first place it is called a play. In the second place, it speaks of a star performer. In the third place, it speaks of the payment by royalties and it speaks of it being played after the play has a production in New York City, it will be considered played upon the road. It has a covenant that it will not be
- 191 sublet or assigned. Now, for example, that is a very good illustration, the eleventh paragraph says that this manager will not lease, sublet, assign or sell any of his aforesaid rights in the said dramatic composition. Now, we propose to show that that is utterly inapplicable to the motion pictures because they do business by leasing and transferring and selling films. Now, in order to show that this is wholly inapplicable to motion pictures, we have got to show what the moving picture business is. We are not really showing what the custom of the moving picture business is, not
- 192 as being a custom in the ordinary sense, but as being the manner in which the moving picture business is carried on, to show that this language is wholly inapplicable to it. So that we intend to show that in cases of moving pictures the film is made by a manufacturing company and the manufacturing company then lets the proprietors of State rights have it, and then it is sublet, down the line; that they paid so much a month, and it is not a case where gross receipts could be meant. It might be possible, of course, that in some particular case the

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whole method of the moving picture business should be revolutionized and they could make a contract of some sort on a gross receipt basis, but we want to show that this is not, cannot be considered to have been possible to refer to moving pictures because gross receipts is not a method in which the moving picture business is carried on. It is a question to see whether this gross receipts provision is fairly to be regarded as compatible with a grant of moving picture rights, and we say that according to the way the moving picture business is carried on in general that it is not. Now, of course your Honor cannot take, I do not suppose, judicial notice of the methods in which the moving picture business is carried on. I take it that any time when the question is whether a given contract would refer to a certain branch of industry, that you would take and consider the methods by which that branch of industry is carried on. We want to show the manner in which the moving picture business is carried on for the purpose of showing that this language is wholly inappropriate, and among them we offer to show that this provision concerning a portion of the gross receipts is utterly inapplicable because they never do such things in the moving picture business.

Mr. Tuttle: I think Judge Noyes has overlooked the provision that is also in the contract for the division equally of flat sums which are realized from production in stock. I believe it is in paragraph 12, which says that "Whenever the play is produced for stock the royalties received from stock theatres is to be divided equally between the party of the first part

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196 and the party of the second part". That is at folio 54.

I mention that simply to show that it is not quite correct to say that the standard of payment is a percentage on the gross receipts because the contract provides for two standard payments. My friend's argument would go very far to render impossible the exercise of many of the rights which are granted by this contract and the supplemental contract. For example, in the supplemental contract it expressly authorizes subletting, selling, transferring, without in any way limiting them as to the terms of payment by the transferee or the sublessee. Oliver Morosco could have assigned for flat sums. Is it to be assumed that if he did that he was not to pay anything to Manners? Not at all. My friends on the other side would be the first persons to contend that he should make a payment if he sublet or assigned for a flat sum, and of course, this provision for an equal division, 50-50, is the answer to any possible claim that a flat sum transfer is provided for in the contracts. But quite aside from all that, the parties here had made their contract in writing and they are now seeking to resort to custom, alleged custom, to vary the express terms which have been used, and the law applicable to that, if I may just read one sentence.

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Mr. Noyes: That is not my claim at all.

Mr. Tuttle: Custom is to be resorted to in the construction of contracts only in cases of doubt or ambiguity as to their meaning. Now, to meet Judge Noyes's other point, custom having been suggested by Mr. Gerber, in the case of Frohman against Fitch, we have this contract. This was set forth before Judge Hand,

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it was almost identical, and in that contract 199
there was no provision for a 50-50 division of
flat sums received, it was solely for gross re-
ceipts, and the only question was whether in a
contract so expressed you could have motion
picture rights included in it, and the Court held
that it could be done on the strength of Mr.
Gerber's brief, who was then on the other side
of the proposition. He answered the points
which he is now making in the following two
sentences only which were sufficient to persuade
the Court.

(Mr. Tuttle reads from brief.)

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In other words, gross weekly receipts was
considered quite an applicable provision in that
case but for some reason or other it is not con-
sidered applicable here.

The Court: I will sustain the objection but
in order to have the point entirely clear should
the case be reviewed, either Judge Noyes or
Mr. Gerber may state what is intended to be
proved.

Mr. Noyes: If your Honor please, I do not
want to seem too persistent or to discuss mat-
ters that your Honor has ruled upon, but if 201
my discussion gave your Honor the same im-
pression that it gave Mr. Tuttle, then I wholly
missed my point.

The Court: I understand the point. Your
point is that you want to show that in 1912
when this contract was signed, the manner and
method of conducting the motion picture busi-
ness was such that these non-assignment and
so forth clauses, and the gross receipts clause,
could not possibly be applicable.

Mr. Noyes: Yes, that is it. We claim this,

John Hartley Manners for Plff.—Direct.

202 that the language of this contract in many particulars is wholly inapplicable and inappropriate to the motion picture industry as carried on at the time when this contract was entered into, and for the purpose of aiding your Honor in determining whether the parties had in mind that motion pictures were to be included in the contract. It seems to me, if your Honor please, your Honor in the Rex Beach case and in the Court of Appeals, in the court above, went into a discussion of the provisions of the contract. Those words "produce, perform and represent" which are in this contract Judge Hand in the Rex Beach case said were wholly inapplicable to grant of motion picture rights, that "produce, perform and represent" was inappropriate. Then there are a vast number of other decisions which obviously clearly show that it is confined to a play production.

203

The Court: I think, as the point is important, I recognize this point, that under the rule I will take the testimony; that is, instead of excluding the testimony from the record I will take the testimony so that it may be preserved for the Court of Appeals. I should sustain the objection at present but I am entirely open to argument on a further consideration.

204

Exception by plaintiff.

Mr. Noyes: Is it your Honor's impression at present that we should not be allowed to show the methods by which the motion picture business was carried on in 1912?

The Court: That is my impression, because I think really that the problem that is before the Court is to determine whether this is Frohman against Fitch or whether it is Klein

John Hartley Manners for Plff.—Direct.

against Beach, or somewhere in between. Now, 205
 a fact has been established here which in Klein
 against Fitch I could only work out from the
 files of the court, to wit, that the motion pic-
 ture business was known, as distinguished from
 the 1899 Ben Hur contract when it was not
 known. Now then, Mr. Manners and Mr.
 Morosco got together and signed a paper at a
 time when they both knew that the motion pic-
 ture business was in existence, and so forth.
 The question is, before I come to the point you
 are after, if I were to look at the contract alone,
 may it be determined that they excluded motion 206
 pictures because they did not mention it, or
 may it be determined that they included motion
 pictures because they made a broad grant
 in one of the clauses, or used language. I do
 not pass on whether it is a broad grant now, but
 the matter seems to be of importance to both
 sides, but my present impression is that with
 the motion picture business known, and also
 knowing that at any time methods of doing busi-
 ness may change, my present notion is that the
 testimony is not admissible, but it is a subject
 of serious argument and conscientious conten-
 tion, and therefore I will take the testimony on 207
 the record with the statement that when I
 listen to final argument I may not change my
 mind.

Mr. Noyes: With regard to the methods of
 carrying on the motion picture business, to go
 into it quite fully would take testimony not
 only through Mr. Manners but through other
 witnesses and your Honor would like to have
 it put in rather than an offer of proof.

Mr. Tuttle: I think your Honor made the
 ruling on the assumption that it would be a

John Hartley Manners for Plff.—Direct.

208

matter which could be readily presented on the record, but this is going to involve all sorts of questions of fact and intricacies because there are as many terms in motion pictures and styles of contracts as can well be conceived of.

The Court: I did say that on the theory that a few questions to Mr. Manners would expose the facts.

209

Mr. Tuttle: In those cases which your Honor has referred to, and indeed in all the cases which can be found in the reports, I shall hand up my brief later, the Court has gone into this matter fully, but on the basis of the terms of the contract, and if there has been such an assumption as is now brought forward, the strangest thing in the world is that no Court nor counsel has ever discussed it until the present time.

The Court: I think the better way would be for me to follow my first feeling on the matter. I suggest that Judge Noyes state what it is that he offers to prove.

210

Mr. Noyes: For the purpose of showing that the language of the contract in the provision relating to the payment of royalties based upon gross receipts is wholly inapplicable and inappropriate as applied to moving pictures, plaintiff offers to prove that the method by which the motion picture industry was carried on at the time of the execution of this contract, he proposes to show that as so carried on the manufacturer of moving pictures leases positive films to distributing agencies, and that the motion picture theatres paid a fixed sum for each day's use of the film, and in other ways to show that the nature of the motion picture

John Hartley Manners for Plff.—Direct.

industry was such that this provision for royalties based upon gross receipts was wholly inappropriate to use in respect thereto. 211

The Court: I will consider the testimony irrelevant and immaterial to the controversy; I will sustain the objection.

Exception by plaintiff.

Mr. Gerber: Your Honor does not sustain it on the ground that it is an offer?

The Court: No, and counsel for the defense makes on that point no objection that it is an offer. The offer is made for the purpose of brevity and when I said before that I would take the testimony I thought that a few words from Mr. Manners might bring out what Judge Noyes has said in the offer. 212

By Mr. Gerber:

Q. 23. Mr. Manners, in 1912 there were what is known as stock theatres and stock companies, were there not? A. Yes.

Q. 24. Will you tell the Court what is known, or what was then known, as a stock company or stock theatre?

Mr. Tuttle: Might I ask what the purpose of that is? 213

Mr. Gerber: The contract has reference to releasing it in stock and that is a technical word that I suppose I may explain to his Honor.

Mr. Tuttle: I do not want to be in the position of opening, or letting any doors be open, if your honor considers it important to be enlightened as to the meaning of the word "stock". It is not one of the issues in the case. It has not been produced in stock.

John Hartley Manners for Plff.—Direct.

214 The Court: I understand what "stock" means but at the same time it might come in somewhere in the case.

Mr. Noyes: Not only that it might come in, it comes directly into the case, as we claim that the language there is wholly inappropriate to the motion picture industry.

The Court: I understand your point; he may answer.

215 A. Stock theatres are theatres where they use plays after they have been played in New York and the metropolitan cities. They are played at a fixed royalty, and as a rule the author divides the royalties——

By the Court:

Q. 25. Spoken plays? A. Yes, sir; not motion pictures.

Mr. Tuttle: I think the part of the answer which said how the royalties are divided went beyond the question.

The Court: Yes, strike that out.

216 Q. 26. Now, in stock theatres, do they have a stock company, one company playing different plays? A. One playing as a rule.

Q. 27. The company remains at the theatre? A. Yes.

Q. 28. And a different play is produced each week? A. As a rule, yes.

Q. 29. What was a stock company in 1912 as distinguished from a stock theatre, a traveling stock company? A. A stock company, as I understood it then, was a repertoire company that would travel from city to city and play a piece a night, and they

John Hartley Manners for Plff.—Direct.

would only use the older plays that had been 217
already used up. They were known as stock reper-
toire companies.

Q. 30. Now, Mr. Manners, tell us what effect
upon a play, in spoken drama, a motion picture per-
formance has?

Mr. Tuttle: If you mean whether they com-
pete one with the other I should not object to
the question, but the question as it stands I
think is entirely objectionable.

Q. 31. Does a motion picture performance com- 218
pete with a performance of the same play in spoken
drama? A. I consider it to be a great handicap.

Q. 32. What are the usual prices charged in mo-
tion picture theatres for admission? A. As low as
five cents.

Mr. Tuttle: I do not like to open any doors
here; I am afraid, I am.

The Court: This line is produced, I assume,
among other things, upon the point of injury?

Mr. Gerber: That is all.

The Court: Mr. Manners can simply answer
what we do not judicially know, but actually
know, and that is that the prices at the mo- 219
tion picture theatres are usually considerably
lower than at the theatres where spoken plays
are delivered.

The Witness: Yes, sir.

Q. 33. And what effect has a motion picture per-
formance of a play upon the production of the same
play in spoken drama in the same city? A. It
would be a most serious handicap to have the same

John Hartley Manners for Plff.—Direct.

220 play done in pictures at 10 cents when you are presenting it at \$2 in the theatre.

Mr. Tuttle: We have nothing with this witness and may I inquire what more is there to the case. They have proved their contracts. We rely on the contracts, they rely on the contracts.

The Court: I think it is desirable for the purpose of the record if you feel so justified to state, as I assume you have in the Answer or somewhere, that it is your intention to produce the play in motion pictures.

221

Mr. Tuttle: I am willing to say that we claim the right to produce the play in motion pictures and that we intend to exercise that right.

Now, may I ask then, if my friends close the case. If they close their case we will rest.

Mr. Noyes: The only question that I have in mind is this, to be perfectly frank. I do not quite know since these new rules requiring the testimony to be incorporated in the record in case of appeal, whether an offer to prove, which I have done, is sufficient or whether we should have the testimony of some one skilled in the motion picture business to testify as to their methods, and if I were satisfied that the offer of proof were sufficient under the new equity rules, because under the new rules the case may go up on appeal to the Appellate Court, and the Appellate Court can pass on the question itself, and I have doubt in my mind whether the offer of proof is quite a sufficient compliance with that. If I thought all those questions were fully protected I think we could close.

222

Case.

The Court: I am almost certain. Quite a 223
number of cases have gone up from my court
in which there have been these offers to prove.
Perhaps, in order to be strictly technical it
might be stated that Mr. Manners if offered
would testify, that it is agreed by both sides
for the purpose of this litigation that Mr. Man-
ners would testify to the matters which coun-
sel offered to prove.

Mr. Tuttle: I am willing to concede for the
sake of brevity that Mr. Manners would testify
in accordance with the offer of his counsel.

Mr. Gerber: That he would testify to the 224
facts.

Mr. Tuttle: Yes; that he would testify as
facts in accordance with the offer of his
counsel. I also call attention to the fact that
I have not objected to the testimony on the
ground that Mr. Manners is not qualified, that
has not been the ground of my objection. I
do not wish to concede anything I do not know
about, but I have not objected to the offer of
that kind, so it seems to me that covers that
point.

The Court: You have objected solely on the 225
ground of immateriality and irrelevancy of the
testimony.

Mr. Tuttle: Yes.

The Court: I think that is perfectly safe,
Judge Noyes. Suppose it appears on the rec-
ord, Mr. Tuttle and Mr. Klein, that no such
point will be made in the Appellate Court.

Mr. Tuttle: About his qualifications?

The Court: No objection will be made in
the Appellate Court to the fact that either the
counsel has offered to prove or that Mr. Man-
ners who is now on the stand has not at length

Case.

226 stated what counsel says he would have stated if asked.

Mr. Tuttle: I agree to that. Of course, your Honor will understand that in making this concession I do not concede the facts to be as Mr. Manners might testify and I would claim the right to cross-examine him before the matter be given any probative weight whatsoever.

227 The Court: That is the usual form. You do not concede that Mr. Manners's testimony would be correct in respect of the facts but you do concede that Mr. Manners if called would so testify?

Mr. Tuttle: Yes, sir.

Mr. Noyes: And the same is true both with respect to our offer of Miss Taylor's contract and the evidence which we offered along that line.

The Court: Yes; this applies to each offer contained in the record.

Plaintiff excepts to the exclusion by the court of the evidence which plaintiff offered, and to the court's ruling in sustaining the objection to the evidence.

228 Mr. Tuttle: I reserve not only the right to cross-examine Mr. Manners in case the offer should by any court be held acceptable, but also the right to bring witnesses to prove the contrary. I would want to reserve the right to call witnesses in rebuttal of any testimony that Mr. Manners might have given in accordance with the offer although I said he would have given the testimony in accordance with the offer.

The Court: Yes.

Mr. Gerber: How would that leave the rec-

Case.

ord, if counsel reserves the right to call witnesses and reserves the right to introduce evidence. Is the case closed or is it not closed. 229

The Court: Yes; he is simply preserving that right in the event of appeal. Let me make this statement. Under the present equity rules of course the Circuit Court of Appeals has very wide powers in an equity case on review. Usually the Circuit Court of Appeals accommodates its decision to the facts as developed in the record and disposes of the matter without sending the case back to the District Court. There are, however, cases where justice requires that the cause be sent back to the District Court either for a new trial or additional testimony. My view in a case of this kind is this, that it unnecessarily encumbers the record and adds more to the expense of the litigants to take testimony on a point or proposition which I think is irrelevant to the issue. If I took Mr. Manners' testimony at length, his cross examination, and the testimony of such witness or witnesses as the defendant might produce for the purpose of contradicting Mr. Manners, I would, as I view it, permit an unnecessarily voluminous addition to the record. As the record now stands the points involved are clearly exposed by both sides and as I view the case the only questions involved are questions of law. Therefore, both the plaintiff and the defendant have added to the clearness by having a simple character of record, one by the offer and the other by reserving the right to call a witness or witnesses to contradict what Mr. Manners would have testified to in the event that the Circuit Court of Appeals should disagree with this Court on that point. 230 231

Case.

232

I make this statement so that the fact that the plaintiff has put the matter in the form of an offer shall not in any manner deprive the plaintiff of his rights and the fact that the defendant in order not to encumber the record and unnecessarily prolong the trial has been willing to let the matter go as it is, may not in any manner be affected in his rights for undoubtedly the Circuit Court of Appeals will order either a new trial or testimony to be taken upon the excluded questions if that Court should find on this point that this Court was in error.

233

Mr. Noyes: If your Honor please, there is only one suggestion. I think Mr. Tuttle's statement should be that he reserves the right in the event of appeal. I think that should be added to it. The broad reservation of his right would be inconsistent with the closing of the case.

The Court: I understand that the rights are reserved merely to safeguard in case of appeal.

Mr. Tuttle: I presume that your Honor will not change your ruling.

234

The Court: I will not. On this point my ruling will remain the same.

Final Decree.

At a Trial Term of the United States District Court, for the Southern District of New York, held in and for the said District, at the Court Room thereof, at 233 Broadway, Borough of Manhattan, New York City, on the 9th day of December, 1918. 235

Present:

Hon. JULIUS M. MAYER,
District Judge.

J. HARTLEY MANNERS,
Plaintiff,

AGAINST

OLIVER MOROSCO,
Defendant.

In Equity.
15-214.

236

This cause having duly come on to be heard, and the allegations and proofs on the part of the plaintiff and the defendant having been heard and considered; and after hearing counsel for the respective parties, and due deliberation having been had thereon, and the memorandum of this Court's opinion having been filed,

237

Now, on motion of William Klein, solicitor for the defendant, Oliver Morosco, it is hereby

ORDERED, ADJUDGED AND DECREED, that the bill of complaint herein be, and it hereby is, dismissed upon the merits; that the rights granted in the paragraph designated "First" in the contract of January 19, 1912, are not limited in duration to the period of years or seasons specified in paragraph "Third" of the said contract, and include the motion picture rights to the play entitled "Peg O' My Heart"; that the defendant, Oliver Morosco, recover of the plaintiff his costs as taxed herein, in the sum of dollars (\$24.35), and that the said de-

Final Record.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Complainant,

vs.

OLIVER MOROSCO,
Defendant.

In Equity.
E15-214.

The complainant in the above entitled cause, filed his bill of complaint, a copy of which is hereunto annexed, on the 26th day of April, one thousand nine hundred and eighteen, and the writ of sub-pœna was thereupon issued, and returned personally served.

On September 24th, 1918, an answer to said bill of complaint was filed by William Klein, Esq., Solicitor, a copy of which is hereto annexed.

240 Testimony was thereafter taken by the respective parties.

Afterwards, and at the November term 1918 of said Court, present the Honorable Julius M. Mayer, Judge, the said cause came on to be heard on the pleadings and proofs, and was argued by counsel. On the 9th day of December, one thousand nine hundred and eighteen, a decree of said Court was filed and entered in favor of the defendant, by which it was adjudged that the bill of complaint herein be dismissed with costs, the same being hereto annexed.

Final Record.

And the costs having been taxed by the clerk at 241
Twenty-four & 35/100 (\$24.35) dollars, the process,
pleadings, and decrees together with other papers
filed in said cause, are duly annexed hereunto.

Wherefore let the said Oliver Morosco recover of
said J. Hartley Manners the sum of Twenty-four &
35/100 (\$24.35) dollars, costs as adjudged in said
final decree.

Signed and enrolled this 13th day of December,
A. D. 1918.

ALEX. GILCHRIST, JR.
Clerk.

A True Copy

242

ALEX GILCHRIST, JR.

[SEAL]

Clerk

244

Petition for Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,

AGAINST

OLIVER MOROSCO,
Defendant.

245

The above named plaintiff, J. HARTLEY MANNERS, conceiving himself aggrieved by the judgment or decree made and entered in the above entitled cause, on the 9th day of December, 1918, and the Final Record of December 13, 1918, does hereby appeal from said judgment and decree and Final Record to the United States Circuit Court of Appeals, for the Second Circuit, for the reasons specified in the assignment of errors, which is filed herewith.

246

And the said J. HARTLEY MANNERS prays that he be allowed this appeal, and that a transcript of the record, papers and proceedings upon which said judgment or decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Second Circuit.

Dated, New York, December 19th, 1918.

DAVID GERBER,

Solicitor for Plaintiff,

Office & P. O. Address: 32 Broadway,

Borough of Manhattan,

New York City.

Appeal allowed,

December 19, 1918.

LEARNED HAND,

District Judge.

Assignment of Errors.

247

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,

AGAINST

OLIVER MOROSCO,
Defendant.

248

Now comes the plaintiff, J. HARTLEY MANNERS, and files the following assignment of errors, upon which he will rely on his appeal from the judgment or decree in equity, entered herein on the 9th day of December, 1918, and the Final Record of December 13, 1918:

1. That the District Court of the United States, for the Southern District of New York, erred in failing and refusing to grant to the plaintiff the relief prayed for in his bill of complaint herein.

2. That the said court erred in dismissing the plaintiff's bill of complaint herein.

249

3. That the said court erred in dismissing the plaintiff's bill of complaint, on the ground that the rights granted in paragraph designated "FIRST" of the contract of January 19, 1912, are not limited in duration to the period of years or seasons specified in paragraph "THIRD" of the said contract.

4. That the said court erred in dismissing the plaintiff's bill of complaint, on the ground that the rights granted in the contract of January 19, 1912,

Assignment of Errors.

250 included the motion picture rights to the play entitled "PEG O' MY HEART".

5. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff of the publication of the book "PEG O' MY HEART" in novelized form.

6. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff, showing the registration for copyright of the book "PEG O' MY HEART" 251 in novelized form.

7. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff of the assignment from Dodd, Mead & Company to plaintiff, bearing date December 27, 1916, of all dramatic and motion picture rights covered by the copyright of the book "PEG O' MY HEART" in novelized form.

8. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff, as to the contract 252 bearing date July 8, 1912, between Oliver Morosco and Laurette Taylor, which contract, among other things, employed the said Laurette Taylor to appear in "PEG O' MY HEART".

9. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff of the conversations between the plaintiff and the defendant, prior to and at the time of the entering into of the agreement between plaintiff and defendant (Plaintiff's Ex-

Assignment of Errors.

hibit No. 7), in respect of the term or duration of the said agreement or license, and the circumstances under which the term or duration of the said agreement or license (Plaintiff's Exhibit No. 7) was fixed. 253

10. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff, showing that there was a parol understanding between plaintiff and defendant, that the limitation of the contract (Plaintiff's Exhibit No. 7) should be for five years, expiring at the end of the theatrical season of 1918. 254

11. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff, to show that the defendant prepared the contract (Plaintiff's Exhibit No. 7).

12. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff of the contract bearing date July 20, 1914, between the plaintiff and the defendant, respecting the production of the play "PEG O'MY HEART" in England, for a period of three years, with an option for three additional years, and which contract was marked "Exhibit 10" for identification. 255

13. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff, showing the number of theatrical companies put out by the defendant,

Assignment of Errors.

256 producing the play "PEG O' MY HEART", following the execution of the agreement of July 20, 1914, and showing the acts and conduct of the defendant following the execution of the said agreement of July 20, 1914.

14. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff to show, that in 1912, at the time of the execution of the contract, Plaintiff's Exhibit No. 7, the manner and method of conducting the motion picture business were such that
257 the clauses and provisions of the contract (Plaintiff's Exhibit No. 7) were inapplicable and inappropriate to a license to produce the play "PEG O' MY HEART" in motion pictures.

15. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff to prove the method by which the motion picture industry was carried on at the time of the execution of the contract, Plaintiff's Exhibit No. 7, and that at said time, such method was that the manufacturer of the
258 motion picture of a play like "PEG O' MY HEART" leased the positive films through distributing agencies to motion picture theatres which paid a fixed sum for each day's use of the film.

16. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff to show that the nature of the motion picture industry in 1912, when the license, Plaintiff's Exhibit No. 7, was given, was

Assignment of Errors.

such that the provision of the said contract, Plaintiff's Exhibit No. 7, for royalties based upon gross receipts, was wholly inappropriate to a license for use of the play for motion picture purposes. 259

Dated, New York, December 19th, 1918.

DAVID GERBER,
Solicitor for Plaintiff,
Office & P. O. Address: 32 Broadway,
Borough of Manhattan,
New York City.

To:—

WILLIAM KLEIN, Esq.,
Solicitor for Defendant,
120 Broadway, New York City. 260

ALEX. GILCHRIST, JR., Esq.,
Clerk of the District Court of the United
States, For the Southern District of New
York. 261

262

Citation on Appeal.

By the Honorable LEARNED HAND, One of the Judges of the DISTRICT COURT OF THE UNITED STATES, for the Southern District of New York, in the Second Circuit.

To OLIVER MOROSCO, GREETING :

263

YOU ARE HEREBY CITED and admonished to be and appear before a United States Circuit Court of Appeals, for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 18th day of January, 1919, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States, for the Southern District of New York, wherein J. HARTLEY MANNERS is plaintiff-appellant, and YOU are defendant-appellee; and you are required to show cause, if any there be, why the judgment or decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

264

GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 19th day of December, in the year of our Lord One Thousand Nine Hundred and Eighteen, and of the Independence of the United States the One Hundred and Forty-Third.

LEARNED HAND,
Judge of the District Court of the United States, for the Southern District of New York, in the Second Circuit.

Bond on Appeal.

265

NEW AMSTERDAM CASUALTY COMPANY

59 John Street
New York.

Equitable Bldg.
Baltimore, Md.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,

vs.

OLIVER MOROSCO,
Defendant.

Bond on Appeal.

266

KNOW ALL MEN BY THESE PRESENTS, That J. HARTLEY MANNERS, as Principal, and NEW AMSTERDAM CASUALTY COMPANY, a corporation organized under the Laws of the State of New York, with its principal office and place of business at No. 59 John Street, Borough of Manhattan, City of New York, as Surety, are held and firmly bound unto the above named OLIVER MOROSCO, in the sum of TWO HUNDRED AND FIFTY DOLLARS (\$250), to be paid to the said OLIVER MOROSCO, for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. SEALED AND DATED THE 13TH DAY OF DECEMBER, 1918.

267

WHEREAS, the above named J. HARTLEY MANNERS has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the final decree rendered in the above en-

Bond on Appeal.

268 titled suit, by a Judge of the District Court of the United States for the Southern District of New York.

NOW THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the above named J. HARTLEY MANNERS shall prosecute said appeal to effect, and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

J. HARTLEY MANNERS [L. S.]

NEW AMSTERDAM CASUALTY COMPANY

By WILLIAM W. LAPORTE

Resident Vice President.

Attest: WILLIAM L. MCGINTY

Asst. Secretary.

269

STATE OF ILLINOIS, }
County of Cook, } ss.:

On this 17th day of December, 1918, before me personally came the within named J. HARTLEY MANNERS, to me known, and known to me to be the individual described in and who executed the within bond, and he duly acknowledged that he
270 executed the same.

ADA LOUISE KATZ, [SEAL.]

Notary Public,

My Commission expires Nov. 11, 1922.

STATE OF ILLINOIS, }
Cook County, } ss.:

I, ROBERT M. SWEITZER, County Clerk of the County of Cook, DO HEREBY CERTIFY that I am the lawful custodian of the official records of Notaries Public of said County, and as such officer am duly authorized to issue certificates of magistracy, that

Bond on Appeal.

Ada Louisa Katz, whose name is subscribed to the 271
 proof of acknowledgement of the annexed instru-
 ment in writing, was, at the time of taking such
 proof of acknowledgment, a Notary Public in and
 for Cook County, duly commissioned, sworn and
 acting as such and authorized to take acknowledg-
 ments and proof of deeds or conveyances of lands,
 tenements or hereditaments, in said State of Illi-
 nois, and to administer oaths; all of which appears
 from the records and files in my office; that I am
 well acquainted with the handwriting of said
 Notary and verily believe that the signature to the
 said proof of acknowledgement is genuine. 272

IN TESTIMONY WHEREOF, I have hereunto set my
 hand and affixed the seal of the County of Cook at
 my office in the City of Chicago, in the said County,
 this 17 day of Dec. 1918.

[SEAL.] ROBERT M. SWEITZER, County Clerk.

Copies of Resolution of Board of Directors of the
 NEW AMSTERDAM CASUALTY COMPANY

59 John Street	Executive	7 St. Paul Street	
New York, N. Y.	Offices	Baltimore, Md.	273

At a regular meeting of the Board of Directors
 of the New Amsterdam Casualty Company, duly
 called and held at the office of the Company in the
 Borough of Manhattan, City of New York, on the
 11th day of October, 1916, a quorum being present,
 the following resolution was duly adopted:

"RESOLVED, That all bonds and undertakings,
 recognizances, contracts of indemnity and all other
 writings obligatory in the nature thereof, shall be
 signed by the President, any Vice-President or
 Resident Vice-President, and, duly attested by the

Bond on Appeal.

274 Secretary, any Assistant Secretary or Resident Assistant Secretary, and the Corporate Seal of the Company affixed thereto; and such instrument afore-said may be signed by an Attorney-in-Fact, duly appointed and qualified, either individually or in conjunction with some other person or Attorney-in-Fact, as designated in his appointment, and the Corporate Seal of the Company affixed thereto."

I HEREBY CERTIFY, That the foregoing is a true and correct copy of the Resolution of the Board of Directors of the New Amsterdam Casualty Com-
275 pany, passed on the 11th day of October, 1916, at its regular meeting, at the office of the Company in the City of New York, and that said resolution is still in force.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Company this 13th day of December, 1918.

WILLIAM L. MCGINTY,
Assistant Secretary.

At a regular meeting of the Board of Directors of the New Amsterdam Casualty Company called and held for the purpose of electing officers of said
276 Company, at the Home Office of said Company in New York City, N. Y., on the 11th day of July, 1918, at which a quorum was present, the following were unanimously elected officers of said Company:

J. Arthur Nelson, President
Elmore B. Jeffery, Vice-President
Geo. C. Thomas, Vice-President
Thos. H. Fitchett, Vice-President
W. Irving Moss, Vice-President
J. D. Mahon, Vice-President
E. F. Dobson, Vice-President
T. L. Purdum, Vice-President

Bond on Appeal.

277

E. H. Brooks, Vice-President
 Sifford Pearre, Secretary and Treasurer
 F. H. Strickland, Assistant Secretary and
 Assistant Treasurer
 E. G. Letzkus, Resident Vice-President
 Geo. W. Pesinger, Resident Vice-President
 H. T. E. Beardsley, Resident Vice-President
 Wm. W. LaPorte, Resident Vice-President
 E. G. Letzkus, Assistant Secretary
 Harry E. Garner, Assistant Secretary
 Wm. W. LaPorte, Assistant Secretary
 C. P. Brackett, Jr., Assistant Secretary
 Geo. W. Pesinger, Assistant Secretary
 W. W. Hoblitzell, Jr., Assistant Secretary
 R. W. Gallon, Assistant Secretary
 J. H. Donaldson, Assistant Secretary.
 Chas. E. Bennett, Assistant Secretary.
 Wm. L. McGinty, Assistant Secretary.

278

I hereby certify that the above is a true and
 correct list of the officers of the New Amsterdam
 Casualty Company, duly elected at the meeting of
 the Board of Directors of said Company, held on
 the 11th day of July, 1918, at which a quorum was
 present, and that said parties continue as officers
 at the present time.

279

IN TESTIMONY WHEREOF, I hereunto subscribe
 my name and affix the seal of the Company this 13th
 day of December, 1918.

WILLIAM L. MCGINTY,
 Assistant Secretary.

Bond on Appeal.

280

Statement of the Financial Condition of the
NEW AMSTERDAM CASUALTY COMPANY

At close of business December 31, 1917.

CASH CAPITAL\$1,000,000.00

SURPLUS TO POLICYHOLDERS 1,250,595.95

ASSETS		LIABILITIES	
Stocks and Bonds.....	\$2,118,147.60	Reserve for all Unde-	
First Mortgage on Real		termined Claims and	
Estate	92,000.00	Losses	\$831,685.25
Real Estate.....	142,300.96	Reserve for Reinsur-	
Premiums in Course of		ance	1,219,300.65
Collection (less than		Reserve for Accrued	
90 days overdue)....	661,722.46	Commissions	111,031.53
Cash in Bank and Office.	469,560.41	Reserve for Taxes.....	45,000.00
Deposited with Work-		Reserve for all other	
men's Compensation		Liability	109,901.92
Reinsurance Bureau..	54,078.87	Capital .. \$1,000,000.00	
New York Excise		Surplus .. 250,595.95	
Funds	23,673.55	SURPLUS TO POLICY-	
Miscellaneous Items....	6,031.45	HOLDERS	1,250,595.95
Total Assets.....	\$3,567,515.30	Total Liabilities...	\$3,567,515.30

I HEREBY CERTIFY, That the foregoing is a true statement of the assets and liabilities of the said Company as of December 31st, 1917, taken from the books and records of said Company.

282

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Company this 13th day of December 1918

WILLIAM L. MCGINTY

Assistant Secretary.

Subscribed and sworn to be-
fore me this 13th day of
December 1918.

VERNON G. SWOPE

Notary Public.

New York Co. Clerk's No. 510

New York Co. Register No. 10393

My Commission Expires March 30, 1920

Bond on Appeal.

CITY OF NEW YORK }
 State of New York } ss.
 County of New York }

283

On this, the 13th day of December 1918 there personally appeared before me, a Notary Public in and for said City, County and State, WILLIAM W. LAPORTE residing in N. Y. C. and WILLIAM L. MCGINTY residing in N. Y. C. to me known, who being by me duly sworn did depose and say that they reside as aforesaid; that they are the Resident Vice-President and Asst. Secy. respectively of the New Amsterdam Casualty Company described in and which executed the attached instrument; that they know the seal of the said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority of the Board of Directors of said Corporation; that they signed their names thereto by like authority; that each is familiar with the handwriting of the other; and that the signatures subscribed to the attached instrument are genuine.

284

IN WITNESS WHEREOF, I hereunto set my hand and affix my official seal in the City of New York in the State aforesaid, on the day and year first above written.

VERNON G. SWOPE
 Notary Public.

285

New York Co. Clerk's No. 510
 New York Co. Register No. 10393
 My Commission Expires March 30, 1920

(Endorsed)—United States District Court, Southern District of New York.—J. Hartley Manners, Plaintiff, *vs.* Oliver Morosco, Defendant.—Bond.—I hereby approve of the within bond and the sufficiency of Surety therein.—Name Learned Hand.—Date Dec. 19, 1918.—New Amsterdam Casualty Company.

286 **Stipulation as to Printing of Exhibits.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,

AGAINST

OLIVER MOROSCO,
Defendant.

287

IT IS STIPULATED by the solicitors for the respective parties that Plaintiff's Exhibit 1 and Plaintiff's Exhibit 4, for identification, each being a voluminous printed book, be not printed as part of the transcript of record herein, but that the originals of the said books, as marked respectively Exhibit 1 and Exhibit 4 for identification, shall be produced to the court at the time of the argument of the appeal.

Dated, New York, Jany. 6, 1919.

DAVID GERBER

Solicitor for Plaintiff.

288

WM. KLEIN

Solicitor for Defendant.

So Ordered.

January 6, 1918.

J. M. MAYER,

D. J.

Stipulation as to Rule 75.

289

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,

AGAINST

OLIVER MOROSCO,
Defendant.

290

The court consenting, it is stipulated by and between the parties hereto that in the appeal to be taken in this case, the requirements of Rule 75 will be waived, and the transcript of the record shall follow the stenographer's minutes and be in the form of question and answer, and not be reduced to narrative form.

Dated, New York, Jany. 6, 1919.

DAVID GERBER

Solicitor for Plaintiff.

WM. KLEIN

Solicitor for Defendant. 291

So Ordered.

N. Y., January 6, 1919.

J. M. MAYER,

U. S. D. J.

292

Stipulation as to Accuracy.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,

AGAINST

OLIVER MOROSCO,
Defendant.

293

IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, New York, January 6, 1919.

DAVID GERBER
Solicitor for Plaintiff.

WM. KLEIN
Solicitor for Defendant.

Certificate of Clerk as to Accuracy. 295

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,

AGAINST

OLIVER MOROSCO,
Defendant.

296

UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter, as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of January, in the year of our Lord, one thousand nine hundred and nineteen, and of the Independence of the said United States the one hundred and forty-fourth. 297

Clerk.

298

Plaintiff's Exhibit No. 2.**COPYRIGHT OFFICE OF THE UNITED
STATES OF AMERICA**

LIBRARY OF CONGRESS—WASHINGTON

Certificate of Copyright Registration

299

THIS IS TO CERTIFY, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that TWO copies of the DRAMATIC COMPOSITION named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of J. Hartley Manners, 483 West End Ave., New York, N. Y. Title of drama:

Peg O' My Heart.

By J. Hartley Manners, of Great Britain, domiciled in the United States, at New York, N. Y.

Date of publication July 16, 1918.

Copies received July 19, 1918.

Entry: Class D, XXc., No. 50013

THORVALD SOLBERG

300

[SEAL]

Register of Copyrights.

Plaintiff's Exhibit No. 3.

Write nothing here, but fill
out each numbered space below

D1

2 c. rec'd _____

301

Application

rec'd _____

XXc. _____

Leave all above these

words blank Fee rec'd \$

APPLICATION FOR COPYRIGHT—

**DRAMATIC COMPOSITION PUBLISHED IN
THE U. S.**

302

REGISTER OF COPYRIGHTS, Washington, D. C.

Date (1) July 18, 1918.

Of the DRAMATIC COMPOSITION named herein
Two complete copies of the best edition published
in the United States on the date stated herein are
herewith deposited to secure copyright registration,
according to the provisions of the Act of March 4,
1909. \$1 (statutory fee for registration and cer-
tificate) is also inclosed. The copyright is claimed
by

303

Name and address of copyright

claimant (2) J. HARTLEY MANNERS

(Write name in full—State here citizenship of claimant)

(Subject of Great Britain & residing in United
States.)

483 West End Ave. New York New York
(Street) (City) (State)

Name of Author, but if a translation,

then Translator (3) J. HARTLEY MANNERS

(Write name in full)

[Please turn this over]

Country of which the author

or translator is a citizen or

subject (4) United Kingdom of Great Britain
and Ireland [Must be stated]

Plaintiff's Exhibit No. 3.

- 304 An alien author domiciled in the United States must name the place of domicile
 (5) 483 West End Ave., New York City
 Brief title of work (6) Peg O' My Heart
 Exact date of first publication (7) July 16, 1918
[State here the day, month, and year when the work was placed on sale, sold, or publicly distributed]
 Send certificate of registration to (8) J. HARTLEY MANNERS
 483 West End Avenue, New York New York
 (Street) (City) (State)
 Name and address of person sending the fee (9) J. HARTLEY MANNERS,
 305 483 West End Avenue, New York, New York.
 (Street) (City) (State)

If the work is a dramatic composition not reproduced for sale, use form D2; if a published dramatico-musical work, use form D3; if an unpublished dramatico-musical composition, use form D4.
 [Please turn this over]

**COPYRIGHT OFFICE OF THE UNITED STATES OF
 AMERICA, WASHINGTON, D. C.**

- I hereby certify that the foregoing is a true copy of the application as the same was received in this Office on the nineteenth day of July 1918, for the registration of the Dramatic Composition entitled
 306 Peg O' My Heart, entered in the name of J. Hartley Manners, 483 West End Avenue, New York, N. Y., copyright claimant.

IN WITNESS WHEREOF, the seal of this Office has been hereto affixed this twelfth day of November, 1918.

THORVALD SOLBERG,
 Register of Copyrights

[SEAL]

Plaintiff's Exhibit No. 5 for Identification. 307

**COPYRIGHT OFFICE OF THE UNITED
STATES OF AMERICA**

LIBRARY OF CONGRESS

WASHINGTON, D. C.

**CERTIFICATE OF COPYRIGHT REGIS-
TRATION**

THIS IS TO CERTIFY (In conformity with section 55 of the Act to Amend and Consolidate the Acts 308
respecting Copyright approved March 4, 1909,
as amended by the Act approved March 2, 1913),
that two copies of the Book named herein have
been deposited in this Office under the provisions
of the Act of 1909, together with the affidavit pre-
scribed in section 16 thereof; and that registration
of a claim to copyright for the first term of twenty-eight years from the date of publication of said book has been duly made in the name of Dodd, Mead and Company, claimant of copyright, whose address is 443 Fourth Ave., New York, N. Y.; the title of the book registered is Peg o' my Heart. A comedy of youth. By J. Hartley Manners. This 309
novel is founded by Mr. Manners on his play of the same title. Illustrations by Martin Justice. New York: Dodd, Mead and Company, 1913; the author is a citizen of United States; the date of publication is October 30, 1913; the date of the completion of printing is October 16, 1913; the affidavit was received November 4, 1913; two copies were received November 4, 1913, and registration has been made as Class A, XXc., No. 358083.

[SEAL]

**THORVALD SOLBERG,
Register of Copyright.**

310 **Plaintiff's Exhibit No. 6 for Identification.**

WHEREAS, J. Hartley Manners composed, wrote and originated a play called "PEG O' MY HEART", which play has been and is in manuscript form; and

311 WHEREAS, the said J. Hartley Manners (hereinafter called "Author") did enter into an agreement on the 19th day of February, 1913, with Dodd, Mead & Company (hereinafter called "Publishers"), whereby the Author authorized the Publishers to publish, in novelized form, the said play "PEG O' MY HEART"; the said Author, however, reserving the rights of translation and of dramatization and serialization; and

312 WHEREAS, the said Publishers duly published in the United States a novelization of the play, under the said title "PEG O' MY HEART", and did duly comply with the provisions of the United States Copyright Code of 1909, entitled "An Act to Amend and Consolidate the Acts respecting Copyrights", and did duly comply with all the provisions of the said Act, with respect to the deposit of copies and registration of such work, and the giving of the notice of copyright, as provided in and by said Act, and in all other respects;

NOW, THEREFORE, in consideration of the premises, and of the sum of one dollar, paid by the Author to the Publishers, receipt whereof is hereby acknowledged, the Publishers (Dodd, Mead & Company) do hereby sell, assign, transfer and set over unto the Author (J. Hartley Manners) for himself, his executors, administrators, heirs and assigns, the sole and exclusive right to translate the said copyrighted work into other languages or dialects, and to make any other version thereof;

Plaintiff's Exhibit No. 6 for Identification.

also the exclusive right to dramatize the said copy- 313
 righted work; also the exclusive right to perform
 or represent the copyrighted work publicly in any
 manner and by any method by which the said copy-
 righted work may be exhibited, performed, repre-
 sented, produced or reproduced, and the exclusive
 photo-play and motion picture right and right to
 exhibit, perform, represent, produce or reproduce
 the said copyrighted work, or any dramatization
 thereof, by means of motion pictures, and to au-
 thorize and license others so to do, with the right
 to print, reprint, publish, copy and vend any of
 said translations, dramatizations, photo-play or
 motion picture, or the serializations of the said 314
 copyrighted work.

IN WITNESS WHEREOF, the said Publishers (Dodd,
 Mead & Company) have hereunto set their hands
 and seals this 27th day of December, 1916.

DODD MEAD & CO INC

By Edw H Dodd President

[SEAL]

In presence of:

I. F. GRAHAM

342 West 16th St.

MILES W. NOURSE

443 4th Ave

N. Y. City

315

UNITED STATES OF AMERICA, }
 City, County & State of New York, } ss:

On this 11th day of January, 1917, before me per-
 sonally came EDW. H. DODD, to me known, who
 being by me duly sworn, did depose and say: That
 he resides in New York City; that he is the presi-
 dent of Dodd, Mead & Co. Inc., the corporation
 described in and which executed the foregoing in-
 strument; that he knew the seal of said corpora-

Plaintiff's Exhibit No. 6 for Identification.

316

tion; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of its board of directors, and that he signed his name thereto by like order.

HENRY J. DAUSER

[SEAL.] Notary Public Queens Co., N. Y.

Certificate filed in New York Co. No. 193.

317

The Act of March 4, 1909, sec. 44, provides: "That every assignment of copyright shall be recorded in the Copyright Office within THREE CALENDAR MONTHS after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded."

COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA

Library of Congress—Washington

The foregoing assignment of copyright, dated December 27, 1916, and received for record in the Copyright Office on January 15, 1917, has been recorded in the Copyright Office, book 67, pages 188-189, in conformity with the laws of the United States respecting copyrights.

IN WITNESS WHEREOF, the seal of this Office has been hereto affixed this seventh day of February, 1917.

THORVALD SOLBERG

[SEAL]

Register of Copyrights

318

Plaintiff's Exhibit No. 7.

319

AGREEMENT made and entered into this Nineteenth day of January, one thousand nine hundred and twelve, between J. HARTLEY MANNERS of the City, County and State of New York, party of the first part, and OLIVER MOROSCO, of the Burbank Theatre, Los Angeles, California, party of the second part.

WITNESSETH :

WHEREAS the party of the first part is the sole and exclusive author and owner of a certain dramatic composition at present entitled "Peg O' My Heart" and

320

WHEREAS, the party of the second part wishes to obtain the exclusive right and license to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

NOW THEREFORE in consideration of the premises and of the mutual covenants and promises of the parties of these presents hereinafter contained and in consideration of the sum of One Dollar, lawful money of the United States, this day by each of the parties hereto to the other in hand paid, the receipt whereof is hereby reciprocally acknowledged, and for other good, valuable and adequate consideration it is hereby understood, covenanted and agreed by and among the parties to the agreement as follows:

321

FIRST: The party of the first part hereby grants and by these presents hereby does grant to the party of the second part subject to the terms, conditions and limitations hereinafter expressed, the sole and exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

Plaintiff's Exhibit No. 7.

322 SECOND: The party of the second part in consid-
eration of such grant hereby agrees to pay to the
party of the first part the sum of Five hundred
(\$500.00) dollars upon the signing and execution
of this agreement, the receipt whereof is hereby
acknowledged, and which sum shall be in advance
of the royalties to accrue to the party of the first
part under this agreement, and is not to be re-
turned to the party of the second part under any
circumstances whatsoever, but is to be credited as
the payment of the first royalties as hereinafter
provided, if the said play shall be produced by the
said party of the second part under this agree-
323 ment.

THIRD: The party of the second part agrees to
produce the play not later than January first, 1913
and to continue the said play for at least seventy-
five performances during the season of 1913-1914
and for each theatrical season thereafter for a
period of five years.

FOURTH: The party of the second part further
agrees to pay to the party of the first part not later
than the first Wednesday following each and every
week during which a performance of the said play
shall have been given, further sums as royalties, as
324 follows:

Five per cent (5%) of the first four thousand
five hundred (\$4500.) dollars gross weekly re-
ceipts; seven and one half ($7\frac{1}{2}$) per cent on the
next two thousand (\$2,000) dollars gross weekly
receipts; and ten (10%) per cent on all sums over
that amount of six thousand five hundred (\$6,500)
dollars gross weekly receipts—which said sum of
money, together with certified box-office statements,
the party of the second part agrees to send to the
party of the first part.

Plaintiff's Exhibit No. 7.

FIFTH: The said party of the second part further agrees that if during any one theatrical year, such year to begin on the first day of October, said play has not been produced or presented for seventy-five performances, then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part.

325

SIXTH: It is further agreed that the said party of the second part shall present the said play in first class theatres with a competent company, the said company to be mutually satisfactory to both the parties to this agreement, and with Miss Laurette Taylor in the title role of "Peg O' My Heart" and that the play will have a production in New York City and will be continued on the road with Miss Taylor in the part of Peg for at least one season or longer if considered advisable by both parties to this agreement.

326

SEVENTH: No alterations, eliminations or additions to be made in the play without the approval of the author.

EIGHTH: The rehearsals and production of the play to be under the direction of the author.

327

NINTH: The name of the author to appear on all advertising, reading and printed matter used in connection with the play.

TENTH: The author to have the right to print and publish the play, but this right is not to be exercised by the author within six months after the production of said play in New York City unless the written consent of the manager has first been obtained.

Plaintiff's Exhibit No. 7.

328

J. H. M.

ELEVENTH: Said manager does hereby agree that he will not lease, sub-let, assign, transfer or sell to any person or persons, firm or corporation any of his aforesaid rights in and to the said dramatic composition or play without the written consent of said author has first been obtained. Should the play fail in New York City and on the road it is agreed between both parties it shall be released for stock.

J. H. M.
O. M.

329

TWELFTH: Whenever the play is released for Stock the royalties received from the Stock Theatres to be divided equally between the party of the first part and the party of the second part.

THIRTEENTH: This agreement is binding upon the parties hereto, upon their heirs, executors, assigns administrators and successors.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

In the presence of

330

.....

.....

J. HARTLEY MANNERS (L. S.)

OLIVER MOROSCO (L. S.)

It is further agreed that after Miss Taylor shall have finished her season in "*Peg o' My Heart*" as provided for in this contract, her successor in the rôle of "*Peg*" for any subsequent tours shall be mutually agreeable to both parties to this contract.

J HARTLEY MANNERS

OLIVER MOROSCO.

Plaintiff's Exhibit No. 8 for Identification. 331

MEMORANDUM OF AGREEMENT, Made in duplicate and entered into this eighth (8th) Day of July, 1912, by and between OLIVER MOROSCO. of the City and County of Los Angeles, State of California, hereinafter designated as MANAGER, and LAURETTE TAYLOR, of the City, County and State of New York, hereinafter designated by the term ARTIST:

WITNESSETH:

WHEREAS, The said MANAGER is engaged in the theatrical business and is desirous of employing the said ARTIST for the time and upon the terms herein contained; 332

NOW, THEREFORE, In consideration of the premises and of the mutual promises and covenants herein contained, and for the further consideration of one dollar (\$1.00) each to the other in hand paid, the receipt whereof is hereby mutually acknowledged, it is agreed by and between the said MANAGER and ARTIST as follows:—

FIRST

(a) That the said MANAGER does hereby engage and employ the said ARTIST for the theatrical season of nineteen hundred and twelve and thirteen (1912-1913), and for the theatrical season of nineteen hundred and thirteen and fourteen (1913-1914), and for the theatrical season of nineteen hundred and fourteen and fifteen (1914-1915), commencing on or about the fifteenth (15th) day of October in each of the said theatrical seasons and continuing for at least twenty-five (25) weeks during each of the said theatrical seasons at the weekly salary of four hundred dollars (\$400.00) for the theatrical 333

Plaintiff's Exhibit No. 8 for Identification.

334 season of nineteen twelve and thirteen; four hundred and fifty dollars (\$450.00) for the theatrical season of nineteen thirteen and fourteen, and five hundred dollars (\$500.00) for the theatrical season of nineteen fourteen and fifteen, payable weekly on such day of the week as may be mutually agreed upon; said ARTIST to render services in the leading female character of the play entitled "PEG O' MY HEART", or the leading female character of any other plays that may be suited to the talent and ability of said ARTIST, the play or plays, and the part or character to be performed therein by the
335 ARTIST to be mutually agreed upon.

(b) Said MANAGER shall provide said ARTIST with the costumes and dresses required by said ARTIST in the portrayal of said characters which she may be cast to play during the life of this contract.

(c) Said MANAGER shall pay for the transportation of said ARTIST and her maid between the cities where the said ARTIST plays after the opening of this engagement, including sleeper and parlor car accommodations when the same can be reasonably had.

336 (d) The said MANAGER hereby agrees to star the said ARTIST in the said play, "PEG O' MY HEART", or in any other plays in which the said ARTIST may appear under the terms of this contract.

(e) The said MANAGER shall determine such theatres, opera houses, and other places of amusement in the United States and Canada, and the time in which she will present the said productions.

Said MANAGER shall give to the said ARTIST at least two weeks' notice in writing for the time designated by them for the closing of each of the afore-

Plaintiff's Exhibit No. 8 for Identification.

said theatrical seasons during the life of this 337
agreement.

SECOND

(a) Said ARTIST does hereby agree to become engaged and employed and by these presents has become engaged and employed by said MANAGER and to render to the best of her skill and ability her exclusive services for the number of performances each week as shall be in accordance with the legal custom of all places of amusement in such cities in which the said ARTIST shall be directed to appear and at such theatres, opera houses, and other places of amusement in the United States and Canada as 338
she may be required by said MANAGER, and to play the star female character in the production "PEG O' MY HEART", and for other plays to be mutually decided upon hereafter for the aforesaid compensation and in accordance with the terms, conditions, and provisions herein contained.

(b) Said ARTIST shall receive no compensation for rehearsals or for performances in which she does not actually render services, or for non-playing nights during the said term of this contract which occur because of accident, or her sickness, public calamity, or from the act of God or the public enemy. The ARTIST shall, in any event, appear and be paid for at least twenty-five (25) weeks during each theatrical season of nineteen twelve and thirteen (1912-1913), nineteen thirteen and fourteen (1913-1914), and nineteen fourteen and fifteen (1914-1915). 339

(c) It is further expressly understood and agreed by both parties to this contract that in the event of "PEG O' MY HEART", or any other play that might be presented under this contract, being a

Plaintiff's Exhibit No. 8 for Identification.

340 failure in New York and on the road, then and in that event the said ARTIST does agree, at the option of said MANAGER, to play ten (10) weeks of her twenty-five (25) in Los Angeles, California, at one of the said MANAGER's theatres, in star parts in Hartley Manner's plays.

(d) Said MANAGER, however, further agrees that in the event of failure in New York, and on the road, of "PEG O' MY HEART", or any other plays that may be produced during the life of this contract, that during the aforesaid ten (10) weeks in
341 Los Angeles a play will be selected for a return engagement in New York City, and the said MANAGER hereby specifically agrees that in such an event he will present the said ARTIST in New York each year during the life of this contract and for the run of said play, it being thoroughly understood however that if "PEG O' MY HEART", or any other play so selected, is a success in New York, that said ARTIST will remain in said play during its tour throughout the United States and Canada.

THIRD

342 Said MANAGER and said ARTIST further agree that said MANAGER shall have an option, and said option is hereby reserved to them, to continue this contract for three (3) additional seasons, from and after the expiration of the time herein mentioned, to-wit:—The season of nineteen fifteen and sixteen, (1915-1916), nineteen sixteen and seventeen, (1916-1917), and nineteen seventeen and eighteen (1917-1918), and they shall especially feature said ARTIST as a star and pay her the following compensation: \$500.00 ~~25~~ per week and—25—percent-
to be declared at end of each season
age of the net profits \wedge for the entire three (3) seasons, and in the event of said MANAGER exercis-
OK OK
OK. L.T.
OK
O.M.
OK. L.T.

Plaintiff's Exhibit No. 8 for Identification.

ing the right to continue said contract for the ad- 343
ditional three (3) seasons he shall give to said
ARTIST a written notice of his intention so to do on
or before January first, 1915. Said written notice
may be given by mailing the same to last known
residence of the said ARTIST, or to the hotel or place
where she may then be stopping, or to the theatre
where she may then be performing, or by handing
the same to her.

(b) Should said option be exercised by the said
MANAGER, then, commencing with the season of
nineteen fifteen and sixteen (1915-1916), the ARTIST 344
shall appear and be cast in a new play or plays
with a star part suitable to her ability and talent,
the plays and parts assigned her to be mutually
agreed upon, and during the seasons of nineteen
fifteen and sixteen (1915-1916), nineteen sixteen
and seventeen (1916-1917), and nineteen seventeen
and eighteen (1917-1918), she shall be permitted
to appear and receive salary at the rate herein pro-
vided for not less than twenty-five (25) weeks each
of said seasons.

IN WITNESS WHEREOF, the said MANAGER and the
said ARTIST have hereunto set their hands and seals 345
the day and year first above written.

OLIVER MOROSCO (L S)

LAURETTE TAYLOR (L S)

J. HARTLEY MANNERS, Witness.

State of California,
City and County of Los Angeles.

On this eighth (8th) day of July, 1912, before me
personally appeared OLIVER MOROSCO, to me known
and known to me to be the individual described in
and who executed the foregoing instrument, and he

Plaintiff's Exhibit No. 8 for Identification.

346 duly acknowledged to me that he executed the same
for the uses and purposes mentioned therein.

State of California,
City and County of Los Angeles.

On this eighth (8th) day of July, 1912, before me
personally appeared LAURETTE TAYLOR, to me
known and known to me to be the individual de-
scribed in and who executed the foregoing instru-
347 ment, and she duly acknowledged to me that she
executed the same for the uses and purposes men-
tioned therein.

AGREEMENT between OLIVER MOROSCO, party of
the first part, and LAURETTE TAYLOR, party of the
second part:

In consideration of the execution of an agree-
ment entered into contemporaneously herewith, it
is understood and agreed that if the party of the
348 second part shall be enjoined and restrained by an
order of any Court of competent jurisdiction from
playing or performing under the management of
the party of the first part, both parties hereto shall
be released from the Agreement contemporaneously
executed herewith by them, and each shall be re-
leased from the obligation thereof.

Witness our hands and seals this 8th day of
July, 1912.

Plaintiff's Exhibit No. 9.

349

WHEREAS J. Hartley Manners, of the City, County and State of New York, party of the first part hereto, and Oliver Morosco, of Los Angeles, California, party of the second part hereto, have heretofore entered into an agreement, dated January 19th, 1912 (hereinafter called "Original Agreement"), a copy of which is hereto attached, and by express reference thereto made a part hereof; and controversies have arisen and now exist between the parties hereto with reference to the meaning of said Original Agreement, and the parties hereto desire to settle and adjust said controversies, and to change said Original Agreement as hereinafter set forth;

NOW, THEREFORE, in consideration of the premises, and good and valuable consideration, moving from each of the parties hereto to the other, the receipt whereof by the parties hereto is hereby respectively acknowledged, the parties hereto do hereby enter into this Supplemental Agreement:

FIRST: The parties hereto do hereby settle and adjust all of said controversies.

SECOND: Said Original Agreement, except as by this Supplemental Agreement changed, is hereby in all respects ratified, confirmed and approved.

THIRD: Paragraphs "Sixth" and Eighth" of said Original Agreement, and also the addendum or postscript to said Original Agreement (which addendum or postscript bears the signature of said Manners and said Morosco) are each and all hereby cancelled and eliminated from said Original Agreement.

Plaintiff's Exhibit No. 9.

352 **FOURTH:** There shall be, and there is hereby, added to said Original Agreement, the following, to be designated as new paragraph "Sixth" thereof:—

 "Said Morosco may, contemporaneously, and (OM)
 as long as this contract is in force
353 from time to time, ~~during the term of this contract,~~
 produce, perform and represent said play "PEG O'
 MY HEART", with or in as many companies in the
 United States and Canada as he, the said Morosco,
 may, in his sole discretion, deem proper; and it is
 further agreed that Laurette Taylor (Laurette
 Taylor Manners) need *not be* engaged to appear
 and need not appear in the title role or star or prin-
 cipal part, or any other part in any of said com-
 panies, and that the said Morosco need in no way
 consult or confer with the said J. Hartley Manners
 respecting the star, the cast, the featured member
 or members of the cast, the rehearsals, or produc-
 tion of said play by any of said companies—of all
 of which the said Morosco shall have, and is hereby
 given, sole and exclusive charge and control."

FIFTH: There shall be, and there is hereby, added to said Original Agreement, to be known as new paragraph "Sixth-a" the following:—

354 "Said Morosco shall use reasonable efforts to direct that all advertising matter in the United States and Canada shall contain a reference to the fact that said Laurette Taylor was the creator of the role of "PEG" in said play; it being the intention of this provision that said Morosco shall use reasonable endeavors to have said Laurette Taylor's name featured in the manner above indicated, but it being expressly understood and agreed that said Morosco shall have the unlimited right and privilege to feature, star, and advertise any other person or persons appearing or to appear in any of said com-

Plaintiff's Exhibit No. 9.

panies, in any manner that he, said Morosco, shall 355
deem fit or proper."

SIXTH: There shall be, and there is hereby, added to paragraph "Fourth" of said Original Agreement, the following provision:—

"The royalties herein specified shall be paid to the said Manners by said Morosco at the rate herein set forth, for every company performing the said play of "PEG O' MY HEART" in the United States or Canada, under the management of said Morosco, under said Original Agreement or this Supplemental Agreement."

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SEVENTH: It is further agreed that paragraph "Eleventh" of said Original Agreement shall be, and the same is hereby, amended so as to read as follows:—

"Eleventh: Said Morosco is hereby expressly authorized to lease, sub-let, assign, transfer, or sell, to any person or persons, firm or corporation, whatsoever, any of his rights acquired under said Original Agreement or this Supplemental Agreement; it being expressly understood and agreed that no such leasing, sub-letting, assignment, transfer, or sale shall in any way release or discharge said Morosco from his personal liability to pay to said J. Hartley Manners the royalties in amounts, manner, and at the time, as specified in said Original Agreement and in this Supplemental Agreement."

357

EIGHTH: It is further agreed that paragraph "Twelfth" of said Original Agreement shall be and the same is hereby amended, so as to read as follows:

"Twelfth: Said play 'PEG O' MY HEART' may be released for stock, in the United States and

Plaintiff's Exhibit No. 9.

358 (O. M.) Canada, during the ~~term~~ ^{time that} of ^{is in force} this contract, ^{when} ever the net amount realized from all the companies producing the play ~~shall~~, in any one theatrical season ^{shall} yield a net profit of less than two thousand (\$2,000) dollars. Whenever the said play is released for stock company or companies, the royalties received from the stock theatres shall be divided equally between the said J. Hartley Manners and said Morosco as and when received by said Morosco." (L. M.) (J. D. B.) (O. M.)

359 NINTH: It is further agreed that during the period of four years from and after the date hereof, neither party hereto shall or will, without the written consent of the other party hereto first had and obtained, directly or indirectly, produce, represent, or exhibit, or permit, allow or suffer to be produced, represented, or exhibited, or sell, lease, give or transfer, any permission, privilege or right to produce, represent or exhibit, the said play by cinematograph or motion or moving pictures in the United States or Canada. It is further expressly understood and agreed that after the expiration of said four-year period, the rights, whatever they may be, of either said Morosco or said J. Hartley Manners, to directly or indirectly produce, represent or exhibit, or permit, allow or suffer to be produced, represented or exhibited, or sell, lease, give or transfer, any permission, privilege or right to produce, represent or exhibit the said play by cinematograph or motion or moving pictures in the United States or Canada, shall be such as said Morosco and said J. Hartley Manners shall respectively be legally entitled to under and pursuant to the terms of said Original Agreement, to the same extent and with the same effect as though this Sup-

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Plaintiff's Exhibit No. 9.

plemental Agreement had not been entered into. This provision is not to be construed as a recognition by ^{either party hereto} ~~said Manners~~ that ^{the other} ~~said Morosco~~ had, under the Original Agreement, or has, under this Agreement, the right to give or authorize the giving of cinematograph or motion or moving pictures of said play.

361

TENTH: The said J. Hartley Manners and the said Morosco hereby forever mutually release the one the other from any and all claims and demands which either one now has or asserts, or might have or assert, against the other, for or on account of any alleged violation of said Original Agreement, on the part of either of the parties hereto, prior to the execution of this Supplemental Agreement; provided, however, that said Morosco shall and will pay to said J. Hartley Manners, on or before July 31st, 1914, any and all unpaid royalties which said J. Hartley Manners shall be entitled to receive from said Morosco under said Original Agreement and this Supplemental Agreement.

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IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals, in original duplicate, at the City of New York, this 20th day of July, 1914.

(L. M.)
(J D B)
(O M)

363

..... (SEAL)

OLIVER MOROSCO (SEAL)

364

**Plaintiff's Exhibit No. 10 for
Identification.**

THIS AGREEMENT, Made this 20th day of July, 1914, by and between J. HARTLEY MANNERS, of the City, County, and State of New York, party of the first part hereto, and OLIVER MOROSCO, of Los Angeles, California, party of the second part hereto,

WITNESSETH :

365 That, for good and valuable consideration, moving from each of the parties hereto to the other, the receipt whereof by the parties hereto is hereby respectively acknowledged, and in further consideration of the mutual covenants and promises herein contained, by the parties hereto to be respectively performed, it is hereby agreed as follows:—

1. The certain contract dated February 19th, 1913, made by and between said J. Hartley Manners and said Oliver Morosco, by which contract said J. Hartley Manners grants to said Morosco the exclusive right and license to produce, perform, and represent in the United States of America and the Dominion of Canada, a certain play entitled "BARBARAZA" (which contract is hereinafter called the "Barbaraza contract", and a copy of which contract is hereto attached, marked "Exhibit 1", and
366 by express reference thereto made a part hereof) is hereby cancelled, released, and forever discharged; and each of said parties to said Barbaraza contract is hereby forever released and discharged from all liability, of every kind and description, under said Barbaraza contract, to the other of said parties thereto; and the said J. Hartley Manners shall and will forthwith repay to said Morosco the sum of five hundred dollars (\$500.), which sum the said Morosco has heretofore paid under said Barbaraza contract to said J. Hartley Manners.

Plaintiff's Exhibit No. 10 for Identification.

2. The said Morosco and the said J. Hartley 367
Manners have heretofore entered into a contract,
dated February 19th, 1913 (hereinafter called the
"English contract", and a copy of which contract
is hereto attached, marked "Exhibit 2", and by
express reference thereto made a part hereof.)

a. The said English contract is hereby cancelled,
released and discharged, and each of said parties
to said English contract is hereby forever released
and discharged from all liability, of every kind and
description, under said English contract, to the
other of said parties thereto, except as is otherwise
hereinafter provided or specified. The sum of one 368
hundred pounds (£100), being the amount hereto-
fore paid by said Morosco to said J. Hartley Man-
ners under said English contract, shall be applied
as is provided in paragraph 2 of said English con-
tract.

b. The said play "PEG O' MY HEART" shall be
produced in London and in the United Kingdom
and the Provinces thereof, as hereinafter provided,
under the management and direction of said J.
Hartley Manners, or, if he shall so elect, under the
management and direction of any other person
(who shall be a reputable and recognized London 369
theatrical producer, and who is hereinafter desig-
nated as "Nominee") whom said J. Hartley Man-
ners may select, and to whom he shall have the
right to assign the whole or any part of said J.
Hartley Manners' interest in the said J. Hartley
Manners' production (which is hereinafter some-
times termed the "English production") under this
paragraph 2 of this contract. The said English
production shall begin in London, England, on
or before November 15th, 1914, but it may be made
for trial purposes during one or two weeks prior

Plaintiff's Exhibit No. 10 for Identification.

370 thereto, in the United Kingdom outside of said City of London. Immediately after the expiration of said one or two weeks, said English production shall be made in said City of London.

371 The first or preliminary cost of said English production (meaning hereby the original cost to said Morosco of the scenery, stage properties and furniture which he is to furnish for said English production) shall be advanced by said Morosco. Said cost, however, shall not exceed the sum of seven thousand five hundred dollars (\$7,500.) or fifteen hundred pounds (£1500). Said Morosco shall have the right, instead of buying new scenery, stage properties, and furniture, to send from the United States of America, to be used in said English production, the scenery, stage properties, and furniture heretofore purchased and used by him in the original production of said play in the City of New York, State of New York, which said scenery, properties, and furniture shall be shipped by said Morosco on or before October 1, 1914. The said original cost of the scenery, stage properties, and furniture (plus the cost of transportation, if any) so to be furnished by said Morosco, shall be repaid to him out of the first

372 profits realized from said English production, so as aforesaid to be made under this paragraph 2 of this contract. The said cost of said production, so to be repaid to said Morosco, shall be charged as an expense of said English production. The said J. Hartley Manners shall select the members of the company or companies to give said English production, and Laurette Taylor Manners (whose stage name is Laurette Taylor, and who is the wife of said J. Hartley Manners) shall be the star or principal performer in the London company which is to produce said play, and shall enact the name

Plaintiff's Exhibit No. 10 for Identification.

part of "PEG" therein. Said J. Hartley Manners 373 hereby expressly covenants and agrees to, and he shall and will, furnish the services of said Laurette Taylor Manners in said star part in said London company, at least during the entire first continuous run of said play in said City of London, under the management of said J. Hartley Manners, or his said nominee; and said J. Hartley Manners covenants and agrees that said Laurette Taylor Manners shall and will play and perform such star part during said entire time to the best of her skill and ability.

c. Said J. Hartley Manners shall and will manage 374 all of the companies that give said English production, or cause the same to be managed by his nominee, without any expense or charge whatsoever other than the royalties which the said J. Hartley Manners is entitled to receive and to be paid out of the gross receipts of said English production, at the rate specified in paragraphs Second, Fifth, and Sixth of said English contract, which said royalties shall be charged as an expense of said English production.

Said Laurette Taylor Manners shall receive and be paid, as full compensation for her said services 375 in said London company which is to perform said play, the respective sums and emoluments specified in the certain contract dated July 8th, 1912, made by and between said Morosco and the said Laurette Taylor Manners, and which said contract is hereinafter called "the Laurette Taylor contract", and a copy of which contract is hereto attached as "Exhibit 3" and, by express reference thereto, made a part hereof. All of said sums and emoluments so to be paid to said Laurette Taylor Manners shall be charged as an expense of said English production. It is expressly covenanted and agreed that

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376 the entire average total weekly expense of every kind of said London company shall not exceed the sum of seven hundred (£700) pounds, and of provincial companies shall be at least fifteen per cent (15%) less; excepting that the salary to be paid to Laurette Taylor Manners shall be as herein specified.

377 d. If the said J. Hartley Manners and said Morosco shall mutually agree thereto in writing, then and only in that event, a company or companies in addition to the London company in which said Laurette Taylor Manners is to appear as the star as aforesaid, may be sent out to perform said play in the United Kingdom and the Provinces outside of London. But the said Manners may, if he so elects, give performances in the Provinces outside of London, with the said Laurette Taylor Manners and with the company in which said Laurette Taylor Manners appeared in London as the star.

378 e. The net profits realized from any and all performances of said play, whether said performances be given by the said London company of which said Laurette Taylor Manners is to be the star as aforesaid, or by any other company or companies performing the said play in the United Kingdom and the Provinces, shall be divided and paid in the proportion of fifty per cent (50%) to said J. Hartley Manners, and the remaining fifty per cent (50%) to said Morosco; and the total losses, if any, resulting from any or all of said performances shall be borne and paid in like proportion by said J. Hartley Manners and said Morosco.

f. Said J. Hartley Manners shall keep, or cause to be kept, full, correct, and complete books of account of all of the business of all of said companies,

Plaintiff's Exhibit No. 10 for Identification.

to all of which books said Morosco or his designated agent shall at all times during business hours have and be given free and uninterrupted access, with the right to make copies or extracts therefrom; and the said J. Hartley Manners shall render to said Morosco weekly, full and correct accountings of the business of every such company performing said play under the provisions of this paragraph 2 of this contract; and the profits shall be allotted every two weeks, in the proportions hereinbefore provided, and said Morosco's said share thereof shall be paid by said J. Hartley Manners to said Morosco, or his designated agent, on the Tuesday following the week herein provided for the allotment of said profits. Such payment shall be made to such designated agent of said Morosco in London, England, or if there shall be no such designated agent, then such payment shall be made into such bank in London, to the credit of said Morosco, as said Morosco shall from time to time designate. If there be any net losses during any one week, after applying all moneys in the hands of said Manners, or his nominee, properly applicable to the payment of losses, then each of the parties hereto shall, on or before Tuesday of the week following, contribute a sum equal to fifty per cent to pay such losses, but due notice of the amount so ^{first} to be contributed by said Morosco shall [^] be given ^{D G} to him by said J. Hartley Manners, or his nominee, ^{O M} by letter or cable.

g. Said Morosco shall have, and is hereby given, the right to designate and select his own separate representative for each and every such company performing said play. Each of said representatives shall always have and be given, during business hours, free and uninterrupted access to all books,

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Plaintiff's Exhibit No. 10 for Identification.

382 vouchers, and papers of the business of the company to which he is assigned, and may be present at the counting up and checking of the house, and shall be kept by said J. Hartley Manners, or his nominee, promptly and fully informed and advised respecting the doings and business of the company to which such representative is assigned. Each such representative shall receive a salary of not to exceed fifteen pounds (£15) per week, which shall be charged as an expense of the particular company to which such representative is assigned.

383 h. Unless said cancellation of said English contract shall become inoperative, and said English contract be revived, as hereinafter provided, or except as is otherwise hereinafter provided, the provisions of ~~this~~ paragraph 2 of this contract shall remain in full force and effect for three years from the date of the first performance of said play under the said management of said J. Hartley Manners, or his nominee, and, at the expiration of said three-year period, said Morosco shall have the option to renew the provisions of ~~this~~ paragraph 2 of this contract for another period of three years, on the terms and conditions herein specified. D G
O M

384 i. It is expressly covenanted and agreed that if the company which is to perform said play with Laurette Taylor Manners in the star part as aforesaid, shall sustain net losses during the first eight weeks of the production of said play in London, then and in that event, said J. Hartley Manners may, immediately after the expiration of said eight weeks, use the said company, or some other company to be selected by said J. Hartley Manners, to make a further performance of said play for a period of four weeks, either in the said City of London or in the Provinces of the United King-

Plaintiff's Exhibit No. 10 for Identification.

dom; but said further performances shall be at the sole risk, cost and expense of said J. Hartley Manners, that is to say,—all losses sustained after the said eight weeks' performance, and while said further performance is being given, either in said city of London or in the Provinces, for said period of four weeks, shall be borne and sustained solely by said J. Hartley Manners.

If, during the said eight weeks of performance of said play, and during the said additional four weeks further performance (if said J. Hartley Manners shall elect to give such further performance as aforesaid) there shall not be a total net profit of at least one thousand pounds (£1,000) then and in that event said J. Hartley Manners, provided he elects in writing to do so, within one week thereafter, shall have the right to be fully released and discharged from any and all liability and obligation to make further productions of said play under the foregoing provisions of this contract; and if he shall so elect, he shall at once, by cable, notify the said Morosco to that effect. If there shall not be a total net profit of one thousand pounds (£1,000) as aforesaid, then the said Morosco shall, within one week after he shall have received from said J. Hartley Manners, or his nominee, written notice of such fact, have the same right as is hereinbefore given to said J. Hartley Manners, to be released and discharged from the provisions of this paragraph "2" of this contract, provided the said Morosco shall, within said one week, give notice to said J. Hartley Manners of the exercise of such right by said Morosco; such notice may be given by mail or cable, addressed to said J. Hartley Manners at the theatre at which said play shall have been first produced in London, England. If either party hereto shall have exercised the aforesaid right under the aforesaid

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D G.
O. M.

Plaintiff's Exhibit No. 10 for Identification.

388 conditions to release and discharge ~~this~~ paragraph ^{D. G.}
 2 of this contract, then and in that event the said ^{O M}
 Morosco, at his sole option and election, may cancel
 the provision contained in subdivision "a" of para-
 graph 2 of this contract, providing for the cancella-
 tion of said English contract, and said provision
 shall be and become inoperative and void; and the
 said Morosco and the said J. Hartley Manners shall
 be immediately restored to all of their respective
 rights and privileges, benefits and advantages, and
 be subjected to all of their respective obligations
 created in and by said English contract, but in that
 389 event the said J. Hartley Manners shall not have the
 right, as is provided in said English contract, to
 insist or ask that the title role be played by said
 Laurette Taylor Manners, and the said J. Hartley
 Manners shall have no right to be consulted re-
 specting the cast or membership of the company
 that may be selected or created by said Morosco to
 perform said play under said English contract; and
~~that~~ the said Morosco shall then be obligated to pay
 to, and the said J. Hartley Manners shall be entitled
 to receive from said Morosco, no profits or compen-
 sation or emoluments of any kind other than the ^{D. G.}
 royalties expressly specified in the said English ^{O M}
 390 contract.

j. The said right and option of the said Morosco
 to have said cancellation of said English contract
 declared inoperative, and to have said English con-
 tract revived as aforesaid, shall be exercised (if
 exercised by him), by written notice to be mailed
 by said Morosco and addressed to said J. Hartley
 Manners at the theatre at which said play shall have
 been first produced in London, England. Said writ-
 ten notice shall be given by said Morosco within
 three months after he shall have received direct

Plaintiff's Exhibit No. 10 for Identification.

from said J. Hartley Manners written information to the effect that there has not been one thousand pounds (£1,000) net profits as aforesaid. Said written notice of the exercise of such election by said Morosco, shall specify a date not less than fifteen (15) days, or more than sixty (60) days, after the date of the mailing of the notice last aforesaid, within which the said revival of said English contract is to take effect, and the first performance of said play is to be given by said Morosco.

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3. It is hereby further covenanted and agreed that the said Laurette Taylor contract (being exhibit 3 hereto) shall be forever released, cancelled and discharged, and the said Morosco and said Laurette Taylor Manners shall be forever mutually released and discharged from any and all obligations to, and any and all claims and demands of every kind against, each other under said Laurette Taylor Contract; that the said Laurette Taylor Manners shall and will faithfully perform the services of the star or principal performer, and act the part of "Peg" in said London Company, during the entire first continuous run of said play, when produced in said City of London, under the management of said J. Hartley Manners, or his said nominee, as provided in subdivision "b" of paragraph 2 of this contract.

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4. Said J. Hartley Manners hereby covenants and agrees that to the extent that any of the provisions of this contract pertain to or concern said Laurette Taylor Manners, he, said J. Hartley Manners, has full right and authority to bind said Laurette Taylor Manners, and that he, said J. Hartley Manners, shall and will cause her to become personally a party to such provisions of this contract as pertain to or affect her, and that he will secure, on or before August 15th, 1914, her signature to the memorandum appended to this contract.

Plaintiff's Exhibit No. 10 for Identification.

- 394 5. It is clearly understood and agreed that the parties hereto are not and do not intend to become partners in the London company, or any other company producing the said play "PEG O' MY HEART" in London, or the provinces, and that neither party has the right to nor shall pledge the credit of the other, in connection with said production; the intent being that the said Morosco shall receive, as before herein [^] specified, a certain sum to be measured ^{D G} by the profits from the production in London and ^{O M} the Provinces, given by the said Manners or his hereunder
- 395 nominee, [^] for and in consideration of the cancella- ^{D G} tion of the English contract, as provided in para- ^{O M} graph 2, subdivision a, hereof.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals, in original duplicate, at the City of New York, on the day and date first above written.

OLIVER MOROSCO. (SEAL).

J. HARTLEY MANNERS (SEAL).

by DAVID GERBER, his Atty in fact.

- 396 FOR GOOD AND VALUABLE CONSIDERATION, the undersigned, LAURETTE TAYLOR MANNERS (whose stage name is Laurette Taylor) hereby consents to and approves of the foregoing contract, and hereby agrees to comply with and be bound by and perform all of the provisions of the foregoing contract that concern or pertain to her, and which, by the terms of said contract, are to be by her performed.

This memorandum shall take effect as of July 20th 1914, and is executed at London, England, this day of August, 1914, because of the absence of the undersigned from the United States of America at the time of the execution of the foregoing contract.

..... (SEAL).

**Exhibit (Part of Plaintiff's Exhibit No. 397
10 for Identification) 1.**

AGREEMENT, made and entered into this Nineteenth day of February, one thousand nine hundred and thirteen, between J. HARTLEY MANNERS of the City, County and State of New York, party of the first part, and OLIVER MOROSCO, of the Burbank Theatre, Los Angeles, California, party of the second part,

WITNESSETH :

WHEREAS the party of the first part is the sole and exclusive author and owner of a certain dramatic composition at present entitled "BARBARAZA," and 398

WHEREAS, the party of the second part wishes to obtain the exclusive right and license to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and promises of the parties of these presents hereinafter contained and in consideration of the sum of One Dollar, lawful money of the United States, this day by each of the parties hereto to the other in hand paid, the receipt whereof is hereby reciprocally acknowledged, and for other good, valuable and adequate consideration, it is hereby understood, covenanted and agreed by and among the parties to the agreement as follows: 399

FIRST: The party of the first part hereby grants and by these presents hereby does grant to the party of the second part subject to the terms, conditions and limitations hereinafter expressed, the sole and

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 1.

400 exclusive license and liberty to produce, perform
and represent the said play in the United States of
America and the Dominion of Canada.

SECOND: The party of the second part in con-
sideration of such grant hereby agrees to pay to
the party of the first part the sum of Five Hundred
Dollars (\$500.00) upon the signing and execution
of this agreement, the receipt whereof is hereby
acknowledged, and which sum shall be in advance
of the royalties to accrue to the party of the first
part under this agreement, and is not to be returned
401 to the party of the second part under any circum-
stances whatever, but is to be credited as the pay-
ment of the first royalties as hereinafter provided,
if the said play shall be produced by the said party
of the second part under this agreement.

THIRD: The party of the second part further
agrees to pay to the party of the first part not later
than the first Wednesday following each and every
week during which a performance of the said play
shall have been given, further sums as royalties as
follows:

402 Five per cent. (5%) of the first four thousand
five hundred dollars (\$4,500.00) gross weekly re-
ceipts; seven and one-half per cent (7½%) of the
next two thousand dollars (\$2,000.00) gross weekly
receipts; and ten per cent. (10%) on all sums over
that amount of six thousand five hundred dollars
(\$6,500.00) gross weekly receipts—which said sum
of money, together with certified box-office state-
ments, the party of the second part agrees to send
to the party of the first part.

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 1.

FOURTH: It is further agreed that the said party 403
of the second part shall present the said play in
first class theatres with a competent company, the
said company to be mutually satisfactory to both
the parties to this agreement, and with Miss Lau-
rette Taylor in the title role of "Barbaraza", and
that the play will have a production in New York
City, and will be continued on the road for at
least one (1) season, or longer, if considered ad-
visable by both parties to this agreement, with
Miss Taylor, in the part of "Barbaraza."

FIFTH: No alterations, eliminations or additions 404
to be made in the play without the approval of the
author.

SIXTH: The rehearsals and production of the
play to be under the direction of the author.

SEVENTH: The name of the author to appear on
all advertising, reading and printed matter used
in connection with the play.

EIGHTH: The author to have the right to print
and publish the play, but this right is not to be 405
exercised by the author within six months after
the production of said play in New York City un-
less the written consent of the manager has first
been obtained.

NINTH: Said manager does hereby agree that he
will not lease, sub-let, assign, transfer, or sell to
any person or persons, firm or corporation any of
the aforesaid rights in and to the said dramatic
composition or play without the written consent
of said author has first been obtained. Should the
play fail in New York City and on the road, it is

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 1.

406 agreed between both parties that it will be released
for stock.

TENTH: Whenever the play is released for stock
the royalties received from the Stock Theatres are
to be divided equally between the party of the first
part and the party of the second part.

ELEVENTH: It is further agreed that after Miss
Taylor shall have finished her seasons in "Bar-
baraza" as provided for in the contract, her suc-
cessor in the role of "Barbaraza" for any subse-
407 quent tours shall be mutually agreeable to both
parties in this contract.

TWELFTH: This agreement is binding upon the
parties hereto, upon their heirs, executors, assigns,
administrators and successors.

IN WITNESS WHEREOF the parties hereto have
hereunto set their hands and seals the day and year
first above written.

In the presence of

408

.....

.....

(Signed) J. HARTLEY MANNERS (L. S.)

(Signed) OLIVER MOROSCO (L. S.)

This play is to be used by Miss
Laurette Taylor when it is
deemed advisable by both
parties to follow the run of
"Peg O' My Heart."

J H M

O M

**Exhibit (Part of Plaintiff's Exhibit No. 409
10 for Identification) 2.**

AGREEMENT, made this nineteenth day of February, One Thousand nine hundred and thirteen, between OLIVER MOROSCO, Theatrical Manager, of the City and County of Los Angeles, State of California, U. S. A., of the one part, and JOHN HARTLEY MANNERS, Author, of the City, County and State of New York, U. S. A., of the other part.

WHEREAS the said John Hartley Manners agrees to let, and the said Oliver Morosco agrees to hire the exclusive rights of representation in London 410 and the Provinces of the United Kingdom, of the play by the said Author at present entitled "Peg O' My Heart." The said Author agrees to grant the said Oliver Morosco a license to perform the play on the following terms and conditions:

1.—The said Oliver Morosco shall pay one hundred pounds (100 lbs.) down to the said Author on signing this agreement on account of fees.

2.—The said Oliver Morosco shall pay to the said Author for the performance of the said play, when played in London, three pounds (3 lbs.) a performance when the gross weekly receipt shall not exceed 411 the sum of eight hundred pounds (800 lbs.); five per cent of the gross weekly receipts if they shall exceed eight hundred pounds (800 lbs) but not exceed one thousand pounds (1000 lbs.); if the gross weekly receipt shall exceed one thousand pounds (1000 lbs.) but shall not exceed one thousand and two hundred pounds (1,200 lbs.) the fees shall be seven and a half per cent of such gross receipts, but if the gross weekly receipts shall reach or exceed one thousand. two hundred pounds (1,200 lbs),

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 2.

412 then Oliver Morosco shall pay ten per cent of the whole of such gross weekly receipts. Such payments to be made weekly, after the said deposit of one hundred pounds (100 lbs) has been exhausted, not later than the Wednesday following any week in which any such representation shall have taken place.

3.—The said Oliver Morosco shall furnish the said Author with certified copies of returns of all such performances, and shall also give him all reasonable access, if required, to all vouchers and documents necessary for verifying same.

413

4.—Oliver Morosco agrees that at all performances of the said play the text as contained in the prompt copy supplied by the Author shall be spoken without intentional interpolation, alteration or omission. Should it be thought advisable to make any alterations in the dialogue, they shall be made by the Author, who shall not unreasonably withhold consent to make such alterations should Oliver Morosco request him to do so.

414 5.—If the said Oliver Morosco should arrange to send a tour or tours in the Provinces, he shall pay to the said Author fees on the same scale as those for London at the following first class towns:—Liverpool, Manchester, Birmingham, Edinburgh, Glasgow, Dublin, Leeds. At all other towns visited in the United Kingdom the fees shall be two pounds (2 lbs) a performance when the gross weekly receipts shall not exceed three hundred pounds (300 lbs) but if the gross receipts shall reach three hundred pounds (300 lbs) but not exceed six hundred pounds (600 lbs) then Oliver Morosco shall pay

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 2.

five per cent of such gross weekly receipts right 415
through, if the gross weekly receipts shall exceed
six hundred pounds (600 lbs) Oliver Morosco shall
pay seven and a half per cent of such gross weekly
receipts right through. The said Oliver Morosco
shall announce the name of the said Author in all
bills, programmes and advertisements, except news-
paper advertisements. This agreement shall remain
in force for three years from the date of the first
performance, but at the expiration of this period
Oliver Morosco shall have the option of renewing
this agreement on the same terms, provided that he
undertakes that the Author's play shall be per- 416
formed for not less than fifteen (15) weeks in such
year.

6.—Should the said play be performed in any
week for a lesser number of performances than
seven, the fees shall be calculated on an average of
the gross receipts of such lesser number of perform-
ances and pro rata to the terms of this agreement,
a week being understood as seven performances.

As WITNESS the parties have set their signature
hereto.

(Signed) OLIVER MOROSCO

(Signed) J. HARTLEY MANNERS

417

The cast of the play including the char-
acter of Peg to be mutually agreeable
to both parties to the contract, and
the play to be produced within three
years from the date of this contract
unless otherwise mutually agreed
upon.

J. H. M.

O. M.

418 **Exhibit (Part of Plaintiff's Exhibit No.
10 for Identification) 3.**

MEMORANDUM OF AGREEMENT, Made in duplicate and entered into this eighth (8th) day of July, 1912, by and between OLIVER MOROSCO, of the City and County of Los Angeles, State of California, hereinafter designated as MANAGER, and LAURETTE TAYLOR, of the City, County and State of New York, hereinafter designated by the term ARTIST:

WITNESSETH:

419 WHEREAS, The said MANAGER is engaged in the theatrical business and is desirous of employing the said ARTIST for the time and upon the terms herein contained:

NOW, THEREFORE, In Consideration of the premises and of the mutual promises and covenants herein contained, and for the further consideration of one dollar (\$1.00) each to the other in hand paid, the receipt whereof is hereby mutually acknowledged, it is agreed by and between the said MANAGER AND ARTIST as follows:—

420 FIRST

(a) That the said MANAGER does hereby engage and employ the said ARTIST for the theatrical season of nineteen hundred and twelve and thirteen (1912-1913), and for the theatrical season of nineteen hundred and thirteen and fourteen (1913-1914), and for the theatrical season of nineteen hundred and fourteen and fifteen (1914-1915), commencing on or about the fifteenth (15th) day of October in each of the said theatrical seasons and continuing for at least twenty-five (25) weeks during each of the said theatrical seasons at the weekly salary of four hundred dollars (\$400.00) for the

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 3.

theatrical season of nineteen twelve and thirteen; 421
four hundred and fifty dollars (\$450.00) for the
theatrical season of nineteen thirteen and fourteen,
and five hundred dollars (\$500.00) for the
theatrical season of nineteen fourteen and fifteen,
payable weekly on such day of the week as may be
mutually agreed upon; said ARTIST to render
services in the leading female character of the play
entitled "PEG O' MY HEART", or the leading female
character of any other plays that may be suited to
the talent and ability of said ARTIST, the play or
plays, and the part or character to be performed 422
therein by the ARTIST to be mutually agreed upon.

(b) Said MANAGER shall provide said ARTIST
with the costumes and dresses required by said
ARTIST in the portrayal of said characters which
she may be cast to play during the life of this con-
tract.

(c) Said MANAGER shall pay for the transporta-
tion of said ARTIST and her maid between the cities
where the said ARTIST plays after the opening of
this engagement, including sleeper and parlor car
accommodation when the same can be reasonably 423
had.

(d) The said MANAGER hereby agrees to star the
said ARTIST in the said play, "PEG O' MY HEART",
or in any other plays in which the said ARTIST may
appear under the terms of this contract.

(e) The said MANAGER shall determine such
theatres, opera houses, and other places of amuse-
ment in the United States and Canada, and the
time in which she will present the said productions.

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 3.

424 Said MANAGER shall give to the said ARTIST at least two weeks' notice in writing for the time designated by them for the closing of each of the aforesaid theatrical seasons during the life of this agreement.

SECOND

425 (a) Said ARTIST does hereby agree to become engaged and employed and by these presents has become engaged and employed by said MANAGER and to render to the best of her skill and ability her exclusive services for the number of performances each week as shall be in accordance with the legal custom of all places of amusement in such cities in which the said ARTIST shall be directed to appear and at such theatres, opera houses, and other places of amusement in the United States and Canada as she may be required by said MANAGER, and to play the star female character in the production "PEG O' MY HEART", and for other plays to be mutually decided upon hereafter for the aforesaid compensation and in accordance with the terms, conditions, and provisions herein contained.

426 (b) Said ARTIST shall receive no compensation for rehearsals or for the performances in which she does not actually render services, or for non-playing nights during the said term of this contract which occur because of accident, or her sickness, public calamity, or from the act of God or the public enemy. The ARTIST shall, in any event, appear and be paid for at least twenty-five weeks during each theatrical season of nineteen twelve and thirteen (1912-1913) nineteen thirteen and fourteen (1913-1914), and nineteen fourteen and fifteen (1914-1915).

Exhibit (Part of Plaintiff's Exhibit No. 10 for Identification) 3.

(c) It is further expressly understood and agreed 427
by both parties to this contract that in the event of
"PEG O' MY HEART", or any other play that might
be presented under this contract, being a failure in
New York and on the road, then and in that event
the said ARTIST does agree, at the option of said
MANAGER, to play ten (10) weeks of her twenty-five
(25) in Los Angeles, California, at one of the said
MANAGER'S theatres, in star parts in Hartley
Manner's plays.

(d) Said MANAGER, however, further agrees that 428
in the event of failure in New York, and on the
road, of "PEG O' MY HEART", or any other plays
that may be produced during the life of this con-
tract, that during the aforesaid ten (10) weeks in
Los Angeles a play will be selected for a return en-
gagement in New York City, and the said Manager
specifically agrees that in such event he will
present the said ARTIST in New York each year dur-
ing the life of this contract and for the run of said
play, it being thoroughly understood however, that
if "PEG O' MY HEART", or any other play so
selected, is a success in New York that said ARTIST
will remain in said play during its tour throughout 429
the United States and Canada.

THIRD

Said MANAGER and said ARTIST further agree
that said MANAGER shall have an option, and said
option is hereby reserved to them, to continue this
contract for three (3) additional seasons, from and
after the expiration of the time herein mentioned,
to-wit:—The season of nineteen fifteen and sixteen
(1915-1916), nineteen sixteen and seventeen (1916-

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 3.

430 1917), and nineteen seventeen and eighteen (1917-
1918), and they shall especially feature said ARTIST
as a star and pay her the following compensation:
\$500.00 per week and 25 per cent of the net profits
to be declared at end of each season for the entire
three (3) seasons, and in the event of said MAN-
AGER exercising the right to continue said contract
for the additional three (3) seasons he shall give
to said ARTIST a written notice of his intention so
to do on or before January First, 1915. Said
written notice may be given by mailing the same to
431 last known residence of the said ARTIST, or to the
hotel or place where she may then be stopping, or
to the theatre where she may then be performing,
or by handing the same to her.

(b) Should said option be exercised by the said
MANAGER, then, commencing with the season of
nineteen fifteen and sixteen (1915-1916), the ARTIST
shall appear and be cast in a new play or plays
with a star part suitable to her ability and talent,
the plays and parts assigned her to be mutually
agreed upon, and during the seasons of nineteen
fifteen and sixteen (1915-1916), nineteen sixteen
432 and seventeen (1916-1917) and nineteen seventeen
and eighteen (1917-1918), she shall be permitted to
appear and receive salary at the rate herein pro-
vided for not less than twenty-five (25) weeks each
of said seasons.

IN WITNESS WHEREOF, the said MANAGER and the
said ARTIST have hereunto set their hands and seals
the day and year first above written.

(Signed) OLIVER MOROSCO (L. S.)

(signed) LAURETTE TAYLOR (L. S.)

J. HARTLEY MANNERS Witness.

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 3.

State of California
City and County of Los Angeles,

433

On this eighth (8th) day of July, 1912, before me personally appeared OLIVER MOROSCO, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same for the uses and purposes mentioned therein.

.....

434

State of California,
City and County of Los Angeles,

On this eighth (8th) day of July, 1912, before me personally appeared LAURETTE TAYLOR, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same for the uses and purposes mentioned therein.

.....

435

AGREEMENT between OLIVER MOROSCO, party of the first part, and LAURETTE TAYLOR, party of the second part:

In consideration of the execution of an agreement entered into contemporaneously herewith, it is understood and agreed that if the party of the

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 3.

436 second part shall be enjoined and restrained by an
order of any Court of competent jurisdiction from
playing or performing under the management of
the party of the first part, both parties hereto shall
be released from the Agreement contemporaneously
executed herewith by them, and each shall be re-
leased from the obligation thereof.

Witness our hands and seals this 8th day of July,
1912.

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Opinion.

439

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,

AGAINST

OLIVER MOROSCO,
Defendant.

In Equity.

440

WALTER C. NOYES and DAVID GERBER, both of
New York City, for plaintiff.

CHARLES H. TUTTLE and WILLIAM KLEIN, both
of New York City, for defendant.

For convenience of counsel interested in this class of case, the essential features of the two contracts between the parties, are here set forth. For brevity, they will be referred to as the First and Second contracts.

FIRST CONTRACT.

441

"WHEREAS the party of the first part is the sole and exclusive author and owner of a certain dramatic composition at present entitled 'Peg O' My Heart' and

WHEREAS, the party of the second part wishes to obtain the exclusive right and license to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

NOW THEREFORE in consideration of the premises * * * it is hereby understood,

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442 covenanted and agreed by and among the parties to the agreement as follows:

FIRST: The party of the first part hereby grants and by these presents hereby does grant to the party of the second part subject to the terms, conditions and limitations hereinafter expressed, the sole and exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

443 SECOND: The party of the second part in consideration of such grant hereby agrees to pay to the party of the first part the sum of Five hundred (\$500.00) dollars upon the signing and execution of this agreement * * * in advance of the royalties to accrue to the party of the first part under this agreement * * *.

THIRD: The party of the second part agrees to produce the play not later than January first, 1913 and to continue the said play for at least seventy-five performances during the season of 1913-1914 and for each theatrical season thereafter for a period of five years.

FOURTH: The party of the second part further agrees to pay to the party of the first part * * * further sums as royalties, as follows:

444 Five per cent (5%) of the first four thousand five hundred (\$4500) dollars gross weekly receipts; seven and one half (7½) per cent on the next two thousand (\$2,000) dollars gross weekly receipts; and ten (10%) per cent on all sums over that amount of six thousand five hundred (\$6,500) dollars gross weekly receipts—which said sum of money, together with certified box-office statements, the party of the second part agrees to send to the party of the first part.

FIFTH: The said party of the second part further agrees that if during any one theatrical year, such year to begin on the first day of

Opinion.

October, said play has not been produced or 445
presented for seventy-five performances, then
all rights of the said party of the second part
shall cease and determine and shall immedi-
ately revert to the said party of the first part.

SIXTH: It is further agreed that the said
party of the second part shall present the said
play in first class theatres with a competent
company, the said company to be mutually
satisfactory to both the parties to this agree-
ment, and with Miss Laurette Taylor in the
title role of 'Peg O' My Heart' and that the
play will have a production in New York City
and will be continued on the road with Miss
Taylor in the part of 'Peg' for at least one sea- 446
son or longer if considered advisable by both
parties to this agreement.

SEVENTH: No alterations, eliminations or
additions to be made in the play without the
approval of the author.

EIGHTH: The rehearsals and production of
the play to be under the direction of the
author.

NINTH: The name of the author to appear
on all advertising, reading and printed matter
used in connection with the play.

TENTH: The author to have the right to
print and publish the play, but this right is 447
not to be exercised by the author within six
months after the production of said play in
New York City unless the written consent of
the manager has first been obtained.

ELEVENTH: Said manager does hereby
agree that he will not lease, sub-let, assign,
transfer or sell to any person or persons, firm
or corporation any of his aforesaid rights, in
and to the said dramatic composition or play
without the written consent of said author
has first been obtained. Should the play fail
in New York City and on the road it is agreed
between both parties it shall be released for
stock.

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TWELFTH: Whenever the play is released for Stock the royalties received from the Stock Theatres to be divided equally between the party of the first part and the party of the second part.

THIRTEENTH: This agreement is binding upon the parties hereto, upon their heirs, executors, assigns, administrators and successors. * * *

To this agreement, there was an addendum as follows:

449

"It is further agreed that after Miss Taylor shall have finished her season in 'Peg O' My Heart' as provided for in this contract, her successor in the role of 'Peg' for any subsequent tours shall be mutually agreeable to both parties to this contract.

J. HARTLEY MANNERS,
OLIVER MOROSCO."

SECOND CONTRACT.

450

"WHEREAS, J. Hartley Manners, of the City, County and State of New York, party of the first part hereto, and Oliver Morosco, of Los Angeles, California, party of the second part hereto, have heretofore entered into an agreement, dated January 19th, 1912 (hereinafter called 'Original Agreement') a copy of which is hereto attached, and by express reference thereto made a part hereof; and controversies have arisen and now exist between the parties hereto with reference to the meaning of said Original Agreement, and the parties hereto desire to settle and adjust said controversies, and to change said Original agreement as hereinafter set forth:

NOW, THEREFORE, in consideration of the premises * * * the parties hereto do hereby enter into this Supplemental Agreement:

FIRST: The parties hereto do hereby settle and adjust all of said controversies.

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SECOND: Said Original Agreement, except 451
as by this Supplemental Agreement changed,
is hereby in all respects ratified, confirmed and
approved.

THIRD: Paragraphs 'Sixth' and 'Eighth' of
said Original Agreement, and also the adden-
dum or postscript to said Original Agreement
(which addendum or postscript bears the sig-
natures of said Manners and said Morosco)
are each and all hereby cancelled and elimin-
ated from said Original Agreement.

FOURTH: There shall be and there is hereby
added to said Original Agreement, the follow-
ing, to be designated as new paragraph 'Sixth'
thereof:

452

'Said Morosco may, contemporaneously,
and from time to time, as long as this con-
tract is in force, produce, perform and rep-
resent said play 'Peg O' My Heart', with or
in as many companies in the United States
and Canada as he, the said Morosco, may,
in his sole discretion, deem proper; and it is
further agreed that Laurette Taylor (Lau-
rette Taylor Manners) need not be engaged
to appear and need not appear in the title
role or star or principal part, or any other
part in any of said companies, and that the
said Morosco need in no way consult or con-
fer with the said J. Hartley Manners re-
specting the star, the cast, the featured
member or members of the cast, the re-
hearsals, or production of said play by any
of said companies—of all of which the said
Morosco shall have, and is hereby given,
sole and exclusive charge and control.'

453

FIFTH: There shall be, and there is hereby,
added to said Original Agreement, to be known
as new paragraph 'Sixth-a' the following:

'Said Morosco shall use reasonable efforts
to direct that all advertising matter in the
United States and Canada shall contain a
reference to the fact that said Laurette
Taylor was the creator of the role of 'Peg'

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454 in said play; it being the intention of this provision that said Morosco shall use reasonable endeavors to have said Laurette Taylor's name featured in the manner above indicated, but it being expressly understood and agreed that said Morosco shall have the unlimited right and privilege to feature, star, and advertise any other person or persons appearing or to appear in any of said companies, in any manner that he, said Morosco, shall deem fit or proper.'

SIXTH: There shall be, and there is, hereby, added to paragraph 'Fourth' of said Original Agreement, the following provision:

455 'The royalties herein specified shall be paid to the said Manners by said Morosco at the rate herein set forth, for every company performing the said play of 'Peg O' My Heart' in the United States or Canada, under the management of said Morosco, under said Original Agreement or this Supplemental Agreement.'

SEVENTH: It is further agreed that paragraph 'Eleventh' of said Original Agreement shall be, and the same is hereby, amended so as to read as follows:

456 'ELEVENTH: Said Morosco is hereby expressly authorized to lease, sub-let, assign, transfer, or sell, to any person or persons, firm or corporation, whatsoever, any of his rights acquired under said Original Agreement or this Supplemental Agreement; it being expressly understood and agreed that no such leasing, sub-letting, assignment, transfer, or sale shall in any way release or discharge said Morosco from his personal liability to pay to said J. Hartley Manners the royalties in amounts, manner, and at the time, as specified in said Original Agreement and in this Supplemental Agreement.'

EIGHTH: It is further agreed that paragraph 'Twelfth' of said Original Agreement shall be

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and the same is hereby amended, so as to read 457
as follows:

'TWELFTH: Said play 'Peg O' My Heart' may be released for stock, in the United States and Canada, during the time that this contract is in force, whenever the net amount realized from all the companies producing the play in any one theatrical season shall yield a net profit of less than two thousand (\$2,000) dollars. Whenever the said play is released for stock company or companies, the royalties received from the stock theatres shall be divided equally between the said J. Hartley Manners and said Morosco as and when received by said Morosco.'

458

NINTH: It is further agreed that during the period of four years from and after the date hereof, neither party hereto shall or will, without the written consent of the other party hereto first had and obtained, directly or indirectly, produce, represent, or exhibit, or permit, allow or suffer to be produced, represented, or exhibited, or sell, lease, give or transfer, any permission, privilege or right to produce, represent or exhibit, the said play by cinematograph or motion or moving pictures in the United States or Canada. It is further expressly understood and agreed that after the expiration of said four-year period, the rights, whatever they may be, of either said Morosco or said J. Hartley Manners, to directly or indirectly produce, represent or exhibit, or permit, allow or suffer to be produced, represented or exhibited, or sell, lease, give or transfer, any permission, privilege or right to produce, represent or exhibit the said play by cinematograph or motion or moving pictures in the United States or Canada, shall be such as said Morosco and said J. Hartley Manners shall respectively be legally entitled to under and pursuant to the terms of said Original Agreement, to the said extent and with the same effect as though this Supplemental Agreement had not

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460 been entered into. This provision is not to be construed as a recognition by either party hereto that the other had, under the Original Agreement, or has, under this Agreement, the right to give or authorize the giving of cinematograph or motion or moving pictures of said play.

461 TENTH: The said J. Hartley Manners and the said Morosco hereby forever mutually release the one the other from any and all claims and demands which either one now has or asserts, or might have or assert, against the other, for or on account of any alleged violation of said Original Agreement, on the part of either of the parties hereto, prior to the execution of this Supplemental Agreement;
 • • •"

MAYER, District Judge: (after stating the foregoing facts) :—

462 The suit is brought, in effect, to restrain defendant (1) from playing, producing or controlling in any manner, the dramatic composition "Peg O' My Heart" and (2) from manufacturing or presenting any motion picture based upon "Peg O' My Heart." The case requires only the construction of the two contracts, testimony in respect of customs and conversations antecedent to the contracts having been excluded.

1. Plaintiff urges that the first contract amounts only to a license, revocable at his option, except as to the interest of defendant for the period referred to in paragraph "Third" of the first contract—and that time, according to plaintiff, expired in June, 1918, a "theatrical season" concededly meaning from October to June.

Applying fundamental principles to the construction of this contract, it is entirely clear that

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the parties intended that defendant should have all the rights mentioned for all time and that paragraph "Third" (particularly when illuminated by paragraph "Fifth"), as aptly put by counsel for defendant, is a statement of the least that defendant is to do, not of the most he is to have. Had the parties otherwise intended, they could readily have fixed a time limit in paragraph "First" by the addition of words such as "for (blank) years from" or "until" a stated date. The provision in paragraph "Eleventh" merely expressed, *inter alia*, the natural precaution of the playwright in preventing the disposition of the play to persons or corporations who might be distasteful or otherwise not satisfactory to the playwright. Whatever may be said as to paragraphs "Eleventh" and "Sixth" and the addendum, is now academic, in view of paragraphs "Third," "Fourth" and "Eleventh" of the second contract. 463 464

Indeed, the first contract in this respect was an entirely normal arrangement which contemplated full right to defendant to produce the play as long as he deemed proper, provided that he would, in any event, give the play a fair trial and the opportunity for success which the minimum of seventy-five performances during the theatrical seasons, covered by paragraph "Third" would develop. 465

2. I now come to what is the real controversy between the parties, viz: the motion picture rights. On this branch of the case, the question, simply stated, is whether the case at bar falls under *Frohman v. Fitch*, 164 App. Div. 231 or *Klein v. Beach*, 232 F. R. 240; 239 F. R. 109. In the former case the contract recited, "Whereas" Frohman "desires the exclusive right to produce or to have produced the said play" and provided that Fitch

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466 "does sell * * *" to Frohman "the exclusive right to produce the said play." In the case at bar, the contract recites "Whereas" Morosco "wishes to obtain the exclusive right and license to produce, perform and represent the said play" and provides that Manners "does grant" to Morosco "the sole and exclusive license and liberty to produce, perform and represent said play."

It will thus be noted that the word "produce" occurs in both contracts, *i. e.*, in Frohman-Fitch and in Manners-Morosco. When used alone that word has a definite meaning, by virtue of *Kalem Co. v. Harper*, 222 U. S. 55 and *Frohman v. Fitch*,
 467 *supra*, as was pointed out by Judge Learned Hand in *Klein v. Beach*, *supra*. In other words, "produce" includes the presentation in or by way of motion pictures. The scope of the word, as thus judicially defined, can be narrowed only by some other language, employed by contracting parties to express a different intent. Thus, it was that the question in *Klein v. Beach*, *supra*, was whether the additional words "for presentation on the stage" and "on the stage" construed with their context, meant the spoken play.

Of course, it is often possible to find in the opin-
 468 ions of courts, some sentence or phrase which, if isolated from its context, may convey a meaning different from what the writer intended. Opinions, however, must be read as a whole and illustrative observations must be understood as applying only to the question and facts under consideration. Thus read, it will be found that the opinion of each court in *Klein v. Beach*, *supra*, simply held that the particular contract there considered contemplated the spoken play only.

In the case at bar, however, the decision need not rest solely upon particular words found in

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particular paragraphs. The whole structure of the contract demonstrates plainly the strength of defendant's position. 469

When the first contract was executed, motion pictures, as the parties agree and as the testimony shows, were well known. It is not controverted in this case that a motion picture of "Peg O' My Heart" would seriously damage, from a financial standpoint, the production of the spoken play. It is difficult to suppose that Morosco, as a producing manager, would risk the money necessary to produce the play at least seventy-five times each year for several years and leave the motion picture rights outstanding in Manners. In such a situation Manners might, at any time, for some reason satisfactory to himself, sell the motion picture rights and destroy the financial value of the spoken play. Indeed, the Second contract discloses that controversies arose between the parties. 470

It might very well have happened that the play, instead of turning out a great success, might have had a run of short duration with consequent lean royalties. Yet the production might have been saleable for motion pictures at a price in excess of any royalties which failure as a spoken play would indicate. In such circumstances, Manners could not lose. He would have, for himself, the proceeds resulting from his ownership of the motion picture rights, while Morosco would be compelled to pay him the stipulated percent of gross (not net) receipts derived from the compulsory performances required by paragraph "Third" and contemporaneously the financial results to Morosco might be gravely affected by the contemporaneous motion picture. In other words, Manners could not lose and Morosco was sure to lose, and practically the same result would follow if the play were released 471

Opinion.

472 for stock. Courts are not astute to construe contracts with such a result unless the language and intent clearly so require.

Per contra, if Morosco, by the contract, gained the motion picture rights, it is hardly conceivable that, while the spoken play was a success, he would destroy its financial future and possibilities by producing motion pictures contemporaneously and thus destructively compete with himself.

473 Finally, that it was not intended to limit the scope of the production to any field of presentation, is well evidenced by paragraph "Tenth" of the First Contract. The express exclusion of the right to print and publish the play is clearly expressive of the intent to include all rights except those specifically excluded or reserved.

The suggestion that paragraph "Seventh" has any bearing upon the question of motion picture rights, is not persuasive, in view of the *Kalem* and *Frohman v. Fitch* cases.

The bill is dismissed with costs.

November 29, 1918.

District Judge.

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United States Circuit Court of Appeals for the Second Circuit, October Term, 1918.

No. 201.

Argued March 14, 1919; Decided April 16, 1919.

J. HARTLEY MANNERS, Plaintiff-Appellant,

v.

OLIVER MOROSCO, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

Before Ward, Hough, and Manton, Circuit Judges.

Appeal from the District Court for the Southern District of New York. Suit in Equity by J. Hartley Manners against Oliver Morosco. Decree Dismissing the Bill. Plaintiff appeals.

Walter C. Noyes, David Gerber, Counsel for Appellant.
William Klein, Charles H. Tuttle, Counsel for Appellee.

MANTON, *C. J.*:

The appellant is the author of "Peg O' My Heart." He is the husband of Laurette Taylor, the star of that very successful play as dramatized.

On January 19, 1912, the parties entered into a contract which in part provided and granted to the appellee "the sole and exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada." The third paragraph provided:

"The party of the second part (appellee) agrees to produce the play not later than July 1, 1913, and to continue the said play for at least 75 performances during the season of 1913-1914 and for each theatrical season thereafter for a period of five years."

The fifth paragraph provides:

"That the said party of the second part (appellee) further agrees that if during any one theatrical year, such year to begin on the first day of October, said play has not been produced or presented for 75 performances, then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part."

After the contract was made, the play was produced and ran continuously and successfully for a period of seventy-four weeks up to May 30, 1914, in New York, with Laurette Taylor in the star part. On July 20, 1914, the parties entered into an agreement modifying in some respects the agreement of January 19, 1912. By the modi-

fication, arrangement was made for the production of the play without Laurette Taylor in the star part and for other productions in more than one company. It was further provided that the appellee be permitted to lease, stipulate, assign, transfer or sell to any one, any of his rights under either contract. And it was specifically covenanted that the issue now presented between the parties as to the ownership of motion picture rights was to be determined by reference to the original contract. After the execution of this contract a number of companies gave performances in various parts of the United States and Canada. Payment under the terms of the contract was duly made to the appellant.

When the theatrical season of 1917-1918 expired, the appellant, claiming that the appellee no longer had any interest in any of the producing rights, brought this action to restrain further production of the play by the appellee, both on the stage and in motion picture form. Two questions are presented by counsel on this appeal. First, the date, if any, of the termination of the contract, and, second, whether the appellee under the contract is entitled to the motion picture rights.

It is claimed by the appellant that only a license, revocable at his option, was contracted for with the appellee under the third paragraph of the first contract, and that the contract expired at the end of the theatrical season in May, 1918. But that is not what was contracted for. It was not an agreement for personal service or for a mere license, but was a bargain and sale of the sole and exclusive right to produce, perform and represent the said play in the United States and Canada. Property was thereby granted and conveyed. It may be intangible, but it has a value and is the subject of proprietorship. It is not a conveyance which is recoverable at will or for a temporary period, but for the time provided for in the terms of the contract.

The third paragraph is a covenant setting forth the least that the appellee would do in performing the contract. In other words, it sets forth the appellee's assurance of his bona fide endeavor or attempt to make the play a success and thus secure to the appellant some substantial royalties. A mere reading of the paragraph will indicate that the parties fixed a minimum and not a maximum of endeavor on the part of the appellee to make for success. It is not an agreement of the most that the appellee agreed to do to make for success. In this connection, the fifth paragraph must be considered and read with the third paragraph. Plainly, if the appellee had failed to present seventy-five performances of the play "during any one theatrical year," then all rights of the appellee ceased and determined and the play reverted to the appellant. There is harmony between the first and third paragraphs and the intent of the parties that the appellee's rights should not be limited to any definite period is quite plain. The grant was perpetual if the obligations of the contract, particularly paragraphs three and five, were complied with.

The modified contract made on July 20, 1914, reaffirmed the first contract and provided in the ninth paragraph that at least four years after its date, the original contract was still in force, as a con-

veyance of all the production rights, and that neither party would produce the play in motion picture form without the consent of the other and until such time, when, after the expiration of four years, the question of motion picture rights should be determined pursuant to the terms of the original agreement.

This clearly negatives the claim of the appellant that under the third paragraph, the contract expired after five years from January 1, 1912. An agreement for production rights binding the parties' heirs, executors, assignees, administrators and successors, is an assignment and not a mere license (*Photodrama Motion Picture Co. vs. Film Corp.*, 213 Fed. Rep., 374; *aff'd* 220 Fed. Rep., 448).

Since the contract is not revocable by will by either party or otherwise limited as to its duration by its express terms or by the inherent nature of the contract itself with reference to its subject matter, it is reasonably intended to be permanent or perpetual in the obligation it imposes (*Western Union Telegraph Co. vs. Penn. Co.*, 129 Fed. Rep., 849).

In determining the production rights conveyed, whether it included the right to produce in motion picture form or not, we must confine our study to the contract itself. The intention of the parties must be secured from the language employed in the instrument itself. Such intention means the accepted reasonable and judicial settled content of the words employed. If the parties have erred in the use of the words, this kind of action can not grant relief. The words employed "the sole and exclusive license and liberty to produce, perform and represent the said play" has received judicial construction. A motion picture performance is a stage representation of the play and violative of the rights of an owner of the exclusive right of production (*Frohman vs. Fitch*, 164 App. Div., 231).

Ordinarily one may "produce or perform" a spoken play upon the stage but "to represent" seems to be peculiarly appropriate to a motion picture representation of a play. Dramatic rights were held to include the motion picture rights in *Frohman vs. Fitch* (*supra*), in the absence of other words narrowing the meaning of the contract. An author of dramatic composition is protected by §4952 of the Revised Statutes of the United States as to not only the sole right of printing it, but also the sole right of "publishing, performing or representing it or causing it to be performed or represented by others." Nor need we be confined in our determination to a strict legal use of the words employed as heretofore judicially determined. It is apparent that the parties intended the results here pronounced. We think the parties intended a conveyance of the entire right to place the play before the American public in any form. It seems inconceivable that the parties intended to reserve to the appellant the right of production in motion picture form when they gave no such expression of reservation in the language of the contract, and particularly when the language employed indicated a comprehensive grant of all producing rights.

In paragraph Ten of the first contract, the author reserved the right to print and publish the play, but his right was not to be exercised within six months after the production of such play in New

York City unless by written consent of the manager. So, too, reservations were made as to leasing and sub-letting the play. By the tenth paragraph, the author reserved the right of publication in book form.

An expression in the contract of one or more things of a class implies the exclusion of all not expressed, although all would have been implied had none been expressed (13 Corpus Juris, 537).

In view of what appears in this record of the cost and expense of successfully dramatizing this play and what appears to be a lucrative contract resulting to the appellant, this court should be reluctant to give a construction not warranted by the language nor intended by the parties, which would permit of competition by the appellant in the production of this play in motion pictures (*Frohman vs. Fitch*, 164 App. Div., 231).

Appellant, however, says that *Klein vs. Beach* (239 Fed. Rep., 108) supports his views. In that case, it was recited, "whereas the manager wishes to engage the services of the author to dramatize the said book for presentation on the stage" and the novelist granted to the author "the sole and exclusive right to dramatize the said book for presentation on the stage," and the parties agreed to grant to the manager "the sole and exclusive license and liberty to produce, perform and represent the said play or dramatic composition on the stage" the right to dramatize the novel for presentation on the stage was held not to carry the right to produce in motion pictures. This court, in considering *Klein vs. Beach*, supra, said: "the turning point in this case is the scope of the grant whether by its terms it conferred upon Klein the dramatic rights in the larger sense including presentation not only by living actors, but also by motion pictures or whether it was limited to the stage proper." This court approved *Frohman vs. Fitch*, supra, and upon the authority of *Kalen vs. Harper* (222 U. S., 55) stated that the dramatic rights included motion picture rights, but such a conveyance of dramatic rights to have such meaning, cannot be narrowed by other limitations. In *Klein vs. Beach*, supra, stage rights only were granted, and this was made plain in the preamble and the provisions of the contract. This court there said in so holding: "In general it is quite clear that this was the prevailing purpose of the parties."

In the case at bar, no distinction is made between the producing rights which the appellant had and those which he conveyed, except where the parties themselves defined it, such as in paragraph Tenth, to wit, reserving the right to publish the play in book form under conditions there expressed.

We find no error in excluding the contract with Laurette Taylor. This was a contract for the services of Laurette Taylor to perform as a leading female character, not only in this play, but in other plays that might be suited to her talent and ability. It provided for a three year period with an option of three more. It was no evidence indicating a limitation upon the contract between the parties to this litigation and was properly excluded.

The identity of the person who drew the agreement of January 19, 1912 was unimportant. The contract was bilateral. Responsibility

for ambiguity in a contract should be borne by the party who caused it, but there is no ambiguity. It was not important to know the identity of the party who drew the contract.

Holding these views as we do, the decree must be affirmed.

United States Circuit Court of Appeals for the Second Circuit,
October Term, 1918.

No. 201.

J. HARTLEY MANNERS, Plaintiff-Appellant,
against

OLIVER MOROSCO, Defendant-Appellee.

Argued March 14, 1919; Decided April 16, 1919.

Appeal from the District Court of the United States for the Southern
District of New York.

Before Ward, Hough, and Manton, Circuit Judges.

WARD, *Circuit Judge* (dissenting in part):

The grant in the contract under consideration is of an exclusive right "to produce, perform and represent" a play. There has been no judicial construction of any of these words so as to make them technical without reference to the terms of some particular contract. *Harper Bros. vs. Kalem Co.*, 169 Fed. Rep. 61; 222 U. S., 55, was not a case of contract but of infringement of copyright, the question being whether a moving picture show was a dramatization of an author's work. In *Frohman vs. Beach*, 164 App. Div. 231, the exclusive right to "produce" a play was construed in the particular contract to cover moving picture rights, whereas in *Klein vs. Beach*, 239 Fed. Rep. 108, we held the grant of an exclusive right to "produce, perform and represent" a play "on the stage" did not cover moving picture rights. The other words "perform and represent" in that contract and in the contract now under consideration have appeared in our Copyright Act since 1870, U. S. Rev. Stat. 4966, long before moving picture shows were dreamed of. Therefore the question is when the parties used the words "produce, perform and represent" the play what were they intending to cover by those words? It seems to me perfectly plain from the contract that they were intending to cover the spoken play only and if so, the words they used, however large, must be confined to the thing they were contracting about.

The third article of the contract speaks of theatrical seasons, which exist for spoken and do not exist for movie plays.

The fourth article provides for royalties on the gross weekly receipts of the box office, which was held in *Harper Bros. vs. Klaw*, 232 Fed. 609, 612, to be inapplicable to "any method of photoplays

in commercial use or known to witnesses or counsel." The trial judge refused to permit the plaintiff, over his objection and exception, to prove this fact.

The fifth article refers again to theatrical seasons.

The sixth article provides for the production of the play in first class theatres and on the road with Miss Taylor in the title role, which applies in my judgment to the spoken play only.

The eight- article provides that the rehearsals and productions should be under the author's direction, which does not apply to movie shows.

The eleventh article provides that should the play fail in New York or on the road it should be released to stock theatres, which applies to the spoken play only.

On the other hand, I find not a word in the contract indicating an intention to transfer the movie rights though they were perfectly well known by both parties. Therefore though the words of the grant are large enough to cover them, I think the words are to be restricted to what the parties were contracting about, viz., the spoken play.

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court-rooms, in the Post-Office Building, in the City of New York, on the 26th day of April, one thousand nine hundred and nineteen.

Present:

Hon. Henry G. Ward,
Hon. Charles M. Hough,
Hon. Martin T. Manton,
Circuit Judges.

J. HARTLEY MANNERS, Plaintiff-Appellant,

v.

OLIVER MOROSCO, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

C. M. H.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. J. H. Manners v. Oliver Morosco. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 28, 1919. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 169 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of J. Hartley Manners against Oliver Morosco, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the second Circuit, this 5th day of May in the year of our Lord One Thousand Nine Hundred and Nineteen and of the Independence of the said United States the One Hundred and forty-third.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which J. Hartley Manners is appellant, and Oliver Morosco is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eleventh day of June, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,117. Supreme Court of the United States, October Term, 1918. No. 1031. J. Hartley Manners vs. Oliver Morosco. Writ of Certiorari. Copy rec'd 6/13/19 by William Klein, Atty. for Def.; Charles H. Tuttle, Counsel for Deft.

In the Supreme Court of the United States, October Term, 1919.

J. HARTLEY MANNERS, Petitioner,

v.

OLIVER MOROSCO.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari granted therein.

WALTER C. NOYES,
DAVID GERBER,
WM. J. HUGHES,
Counsel for Petitioner.
WM. F. DAY,
CHARLES H. TUTTLE,
Counsel for Respondent.

To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated New York, June 18th, 1919.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
*Clerk of the United States Circuit Court
of Appeals for the Second Circuit.*

[Endorsed:] 370, '19—27117. United States Circuit Court of Appeals, Second Circuit. J. Hartley Manners v. Oliver Morosco. Return to Certiorari.

[Endorsed:] File No. 27117. Supreme Court U. S., October Term, 1918. Term No. 1031. J. Hartley Manners, petitioner, vs. Oliver Morosco. Writ of certiorari and return. Filed July 3, 1919.

MAY 1 1920

JAMES D. NAHER,
CLERK.

IN THE
Supreme Court of the United States,

OCTOBER TERM, 1919.

No. 370.

J. HARTLEY MANNERS,

Petitioner,

v.

OLIVER MOROSCO,

Respondent.

MOTION AS TO FORM OF DECREE AND
MEMORANDUM ON MOTION.

DAVID GERBER,
WILLIAM J. HUGHES,
Counsel for Petitioner.



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1919.

J. HARTLEY MANNERS,
Petitioner,

v.

OLIVER MOROSCO.

No. 370.

CHARLES H. TUTTLE, Esq.,
WILLIAM KLEIN, Esq.,
NATHAN BURKAN, Esq.,

GENTLEMEN :—

PLEASE TAKE NOTICE that on Monday next, May 3rd, or as soon thereafter as counsel can be heard, the undersigned will submit to the Supreme Court of the United States a motion to modify the decree in the above entitled case, copies of which are handed you herewith.

Please acknowledge receipt.

Respectfully,

DAVID GERBER,
WILLIAM J. HUGHES,
Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1919.

J. HARTLEY MANNERS,
Petitioner,

v.

OLIVER MOROSCO,
Respondent.

No. 370.

MOTION AS TO FORM OF DECREE.

Comes now the petitioner in the above entitled case, and suggests to the court that there be entered therein a form of decree to carry into effect the opinion of the court handed down on March 22nd, substantially as follows:

Decree reversed. Injunction to issue on condition that the plaintiff shall neither represent nor authorize the representation of the play, "Peg O' My Heart" in moving pictures, while the contract with defendant remains in force, in any city, town, or place, during the period the play is being produced therein, in the United States or Canada, on compliance with the terms of his contract by defendant.

Or, that the case be remanded to the District Court for further proceedings, not inconsistent with the opinion of this court, to protect the parties to the cause in their rights; petitioner in his right to use the play in moving pictures and respondent in his right to produce it by living actors, in accordance with the terms of their contracts.

DAVID GERBER,
WILLIAM J. HUGHES,
Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1919.

J. HARTLEY MANNERS,
Petitioner,

v.

OLIVER MOROSCO,
Respondent.

No. 370.

**MEMORANDUM ON MOTION AS TO FORM
OF DECREE.**

This court, in its opinion herein, after referring to the power in the petitioner "to set up the same play in motion pictures a few doors off, with a much smaller admission fee", directs that the injunction issue "upon the condition that plaintiff shall neither represent nor authorize the representation of the play 'Peg O' My Heart' in moving pictures while the contract with the defendant remains in force".

The play has been performed in every large city in the United States by Morosco, during the past six years, so that a performance in spoken drama, with any hope of profit, can only be given in small cities or towns, or in stock theatres.

By "stock theatre" is meant, as the record shows, a theatre where they use plays after they have been played in New York and the metropolitan cities. They are played at a fixed royalty, and as a rule the author divides the royalties. . . . Stock theatres have a stock company, which company plays a different play, as a rule, each week the company remains at the theatre (Record, p. 72).

A production by Morosco in a town in California, for instance, could not be affected by a motion picture exhibition in New York.

Under the protection of the decree directed to issue, Morosco may continue indefinitely giving performances in small towns seventy-five times during the theatrical season, if only for the purpose of holding up the exercise by the author of his motion picture rights, and coercing an arrangement with him (Morosco) giving him an interest he does not at present possess.

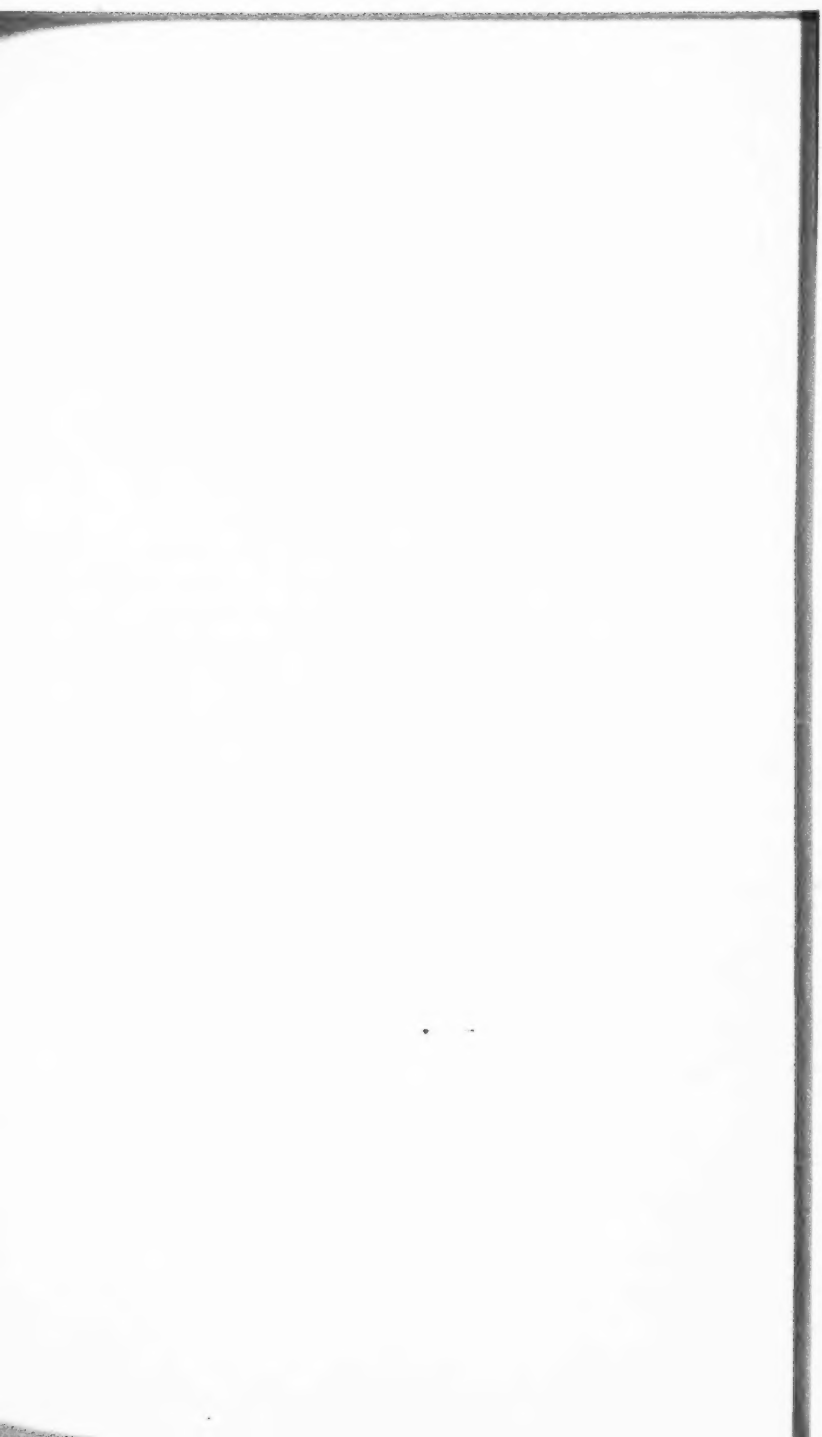
The spirit and intent of the decision of the court, it is submitted, can be carried into effect by a decree, substantially as suggested in the motion, to-wit: *That there be no motion picture exhibition given in any city, town or place, during the period the play is being produced therein by defendant, in the United States or Canada, during the term of the contract and while defendant complies therewith.*

It is further submitted that, if for any reason, it shall seem expedient to frame a decree as above suggested, then the decree below should be reversed with instructions to the District Court for such further proceedings as may be necessary, not inconsistent with the opinion of this court, to protect the parties to the cause in their respective rights, Mannors in his right to use the play in moving pictures, and Morosco the right to produce it under the terms of the contract by living actors.

Petitioner asks that power be not reposed in the respondent to indefinitely and arbitrarily prevent the use of the motion picture rights which the court has decided are the property of petitioner.

Respectfully submitted,

DAVID GERBER,
WILLIAM J. HUGHES,
Counsel for Petitioner.





Office Supreme Court, U. S.
FILED

MAY 7 1920

JAMES D. MAHER,
CLERK.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1919

No. 370

J. HARTLEY MANNERS

Petitioner

vs.

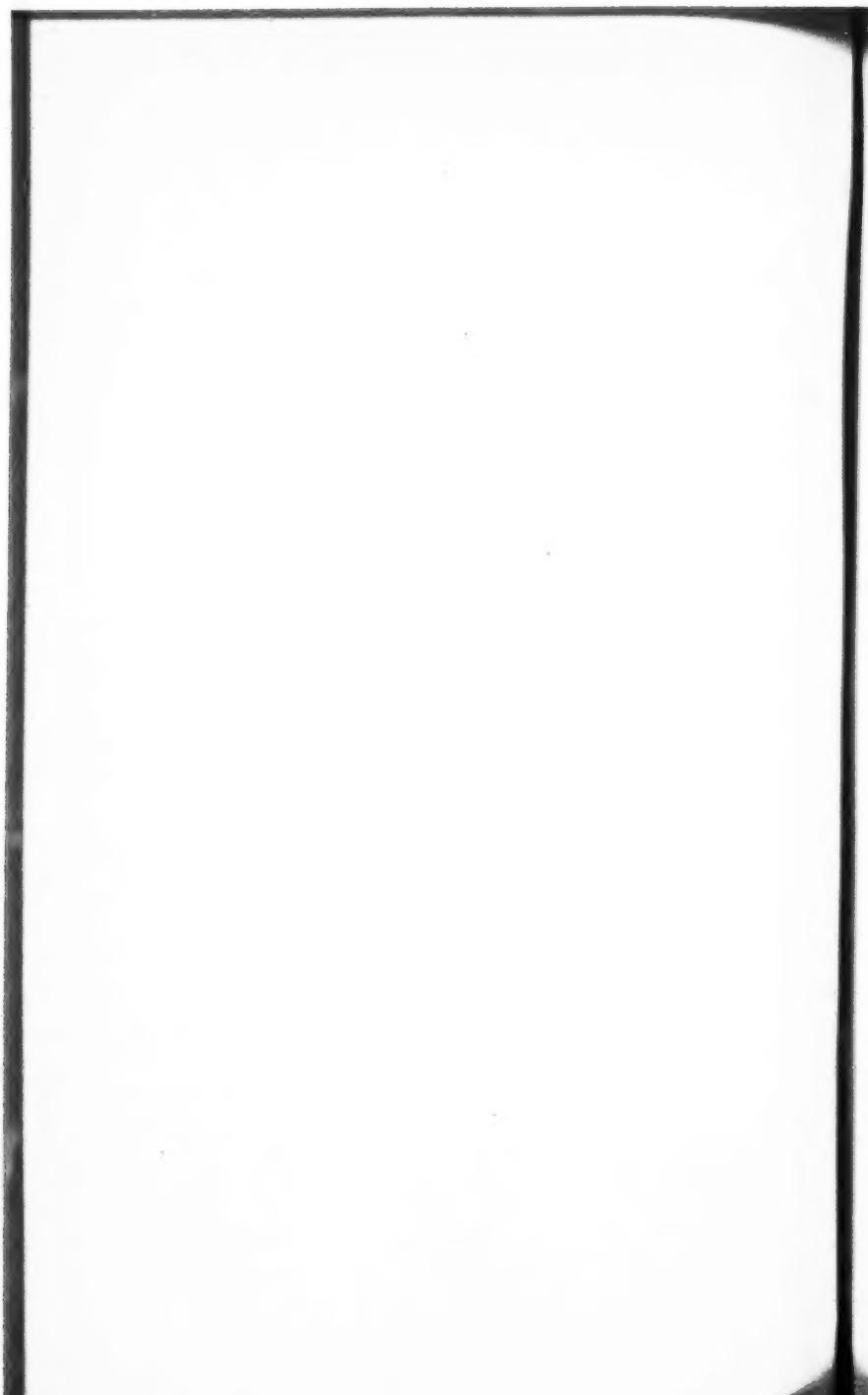
OLIVER MOROSCO

Respondent

MEMORANDUM FOR MOROSCO IN OPPOSITION TO MOTION
AS TO FORM OF DECREE

CHARLES H. TUTTLE
WILLIAM KLEIN

Of Counsel



IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

J. HARTLEY MANNERS,	}
Petitioner,	
<i>against</i>	
OLIVER MOROSCO,	
Respondent.	}

MEMORANDUM FOR MOROSCO IN OPPOSITION TO MOTION AS TO FORM OF DECREE.

We oppose the motion "to modify the decree in the above entitled case." We do so, because:

I. The existing decree is in the usual form of reversal directing that the decree below be

"reversed with costs and cause remanded for further proceedings in conformity with the opinion of this Court."

The petitioner Manners, therefore, has his full remedy in the Court below, and should not trouble this Court with assertions of contested facts which cannot be solved by reference to the record and involve matters which are either wholly irrelevant or can readily be disposed of in a court of first instance.

II. The motion is designed to deprive Morosco of all practical benefit of the implied negative covenant, which this Court enforced by rendering it a condition of the injunction.

Indeed, it would go further, because the motion, if granted, would destroy altogether the market for the spoken play, and would put Morosco entirely at Manners' mercy.

This bold proposal is nothing less than that this Court should allow Manners, contrary to its opinion, "to infest the country" with motion pictures in every locality except the particular "city, town or place" wherein Morosco might happen then to be producing the play. Manners, in short, seeks to rewrite in his own interest the opinion and decision of this Court.

The Court can readily perceive that the country would be flooded by Manners with motion picture representations of the play, unless he was under some restraint; and that if, while Morosco was producing the spoken play in one town, Manners could cover the rest of the country with motion picture productions, "the market for the spoken play would be greatly impaired, if not destroyed." The play could not profitably be moved to any city, town or place which had already been covered by the motion picture production.

Since Morosco has the now unquestionable right to produce the play in any locality in the United States and Canada, he is entitled through enforcement of the implied negative covenant to have the market for the play throughout the same territory preserved and protected. Manners' proposal would destroy it.

Manners' memorandum states:

"The play has been performed in every large city in the United States by Morosco, during the past six years, so that a performance in spoken drama, with any hope of profit, can only be given in small cities or towns, or in stock theatres."

This is not in any respect the fact. The play has not been produced in every large city in the United States or Canada; and even if it had, the qualities of the play are such that it could return with success. Moreover, stock theatres are all over the United States; and if Manners may "mop up" the United States with motion picture production, Morosco's conceded right and his purpose to have the play produced in these theatres would be nullified.

Manners' memorandum further says:

"A production by Morosco in a town in California, for instance, could not be affected by a motion picture exhibition in New York."

But Morosco's unquestionable right to produce the spoken play in New York and its vicinity would be vastly affected by a previous motion picture exploitation thereof throughout the numerous motion picture theatres in that locality.

Moreover, under the proposal in Manners' present motion, Manners would be permitted to have a prior production in the assumed "town in California" before Morosco attempted to take his play there;—indeed, in every other locality in the United States, thus destroying in advance all possibility for profitably producing, moving or marketing the play or taking any further benefit from the contract between Morosco and Manners.

It is not too much to say that the proposal in Manners' motion is a patent device to neutralize

altogether the enforcement decreed by this Court of the implied negative covenant on Manners' part. It would permit Manners to do just what this Court said he should not do.

This Court quoted with approval from *Harper Bros v. Klaw*, 232 Fed. Rep., 609, as follows (p. 613):

"Admittedly if Harper Bros. (or Klaw and Erlanger, for the matter of that), permitted photo-plays of Ben Hur to infest the country, the market for the spoken play would be greatly impaired, if not destroyed."

This action of this Court in thus adopting the decision of Judge Hough in *Harper Bros. v. Klaw, supra*, renders applicable the decree as entered by Judge Hough in that case. The clause therein in which he enforced the negative covenant reads as follows:

"FURTHER ORDERED, ADJUDGED AND DECREED: That the complainants Harper & Brothers and Henry L. Wallace, and each of them, and their and each of their successors, agents, servants, licensees and employees, and any other person acting under their direction, control or otherwise, be and they are hereby enjoined and restrained during the term of the contract between the complainants and the defendants dated the 11th day of April, 1899, from playing, producing, exhibiting, by means of motion pictures, by themselves or their agents, servants, assignees or licensees, on the stage of any theatre or place of public entertainment and amusement, the said novel entitled 'Ben Hur, a Tale of the Christ,' or any dramatization of the said novel, or any dramatic composition entitled 'Ben Hur,' or any of its scenes, incidents, plot or story, or any simulation, imitation or adapta-

tion of said book or dramatic composition, under the title of 'Ben Hur,' or otherwise."

It will be seen that this clause contained no such absurd and stultifying provision as is now proposed in the present motion by Manners.

Dated May 6, 1920.

Respectfully submitted,

CHARLES H. TUTTLE,
WILLIAM KLEIN,
Counsel for Oliver Morosco.

[4630]

United States Supreme Court, U. S.
FILED

SEP 20 1919

JAMES D. MAHER,
CLERK.

No. 370

Supreme Court of the United States

October Term, 1919

J. HARTLEY MANNERS,

Petitioner,

v.

OLIVER MOROSCO.

**On Writ of Certiorari to the United States Circuit
Court of Appeals for the Second Circuit**

**MOTION TO ADVANCE AND TO PLACE ON THE
SUMMARY DOCKET**

No. 370.

IN THE SUPREME COURT OF THE UNITED
STATES,

OCTOBER TERM, 1919.

J. HARTLEY MANNERS,
Petitioner,

v.

OLIVER MORESCO.

*ON WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.*

MOTION TO ADVANCE AND TO PLACE ON THE SUMMARY
DOCKET.

To:

MESSRS. CHARLES H. TUTTLE and
WILLIAM KLEIN,
Counsel for Respondent.

Please take notice that on the record in the above-entitled matter, on file with the Clerk of the Supreme Court of the United States, the undersigned will submit a motion to the said Court, at the Court Room in the Capitol Building, in the City of Washington, District of Columbia, on the first Monday of October, 1919, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, to advance this cause and place the same on the Summary Docket.

Dated, July 9th, 1919.

WALTER C. NOYES,
DAVID GERBER,
WM. J. HUGHES,
Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED
STATES,

OCTOBER TERM, 1919.

J. HARTLEY MANNERS,	}	No. 370.
<i>Petitioner,</i>		
<i>v.</i>		
OLIVER MORESCO.		

*ON WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.*

MOTION TO ADVANCE AND TO PLACE THE CASE ON THE
SUMMARY DOCKET.

Comes now the petitioner in the above-entitled cause by his counsel and moves the Court to advance the case for hearing at the present term and to place the same upon the summary docket.

The case involves the question whether a license contract to "produce, perform and represent" a copyrighted dramatic work, *i. e.*, the play "Peg O' My Heart", which contract contained provisions relating to "theatrical seasons"; for the payment of royalties on gross weekly box office receipts; for the production of the "play" in first-class theaters and on the road with a competent and satisfactory "company" and with a particular prominent actress in the title role; for rehearsals and production under the author's direction; providing that there should be

no alterations, eliminations or additions made in the play without the approval of the author; for its release to stock theaters in the event of failure in New York—all terms applicable to the spoken drama but not to moving pictures—and which is silent as to any transfer of motion picture rights, nevertheless conveyed those rights from the author to the licensee; and the further question whether the contract gave a license in perpetuity or for a limited time only.

Whether the screen rights pass from an author to a producer of the spoken drama under contracts similar to that involved in this case is of much consequence to a large number of authors and producers of plays and persons engaged in the moving picture industry, so that the case is one of general public interest. As the questions presented will not require extended argument, it is submitted that the case is a proper one to be advanced for hearing on the summary docket.

Notice of this motion has been served on opposing counsel.

WALTER C. NOYES,
DAVID GERBER,
WM. J. HUGHES,
Counsel for Petitioner.



Office Supreme Court, U. S.
FILED

JAN 17 1920

JAMES D. MAHER,
CLERK.

IN THE
Supreme Court of the United States,
OCTOBER TERM, 1919.

J. HARTLEY MANNERS,
Petitioner,

v.

OLIVER MOROSCO.

No. 370.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

**JOINT MOTION TO PLACE ON SUMMARY
DOCKET.**

Come now the parties to the above entitled cause by their respective counsel and jointly move the Court to place the same on the summary docket for early hearing.

Although a motion by petitioner to advance and place on the summary docket has heretofore been denied, counsel feel that this may have been due to the opposition of respondent thereto. The motion is now renewed for the following reasons:

On the argument before District Judge Mayer on the form of decree to be entered in favor of the

plaintiff, in *Manners v. Famous Players-Lasky Corporation*, the attention of the court was called to the fact that an application was made to place this cause upon the summary docket, which was denied because of the opposition of the respondent. Judge Mayer suggested that it was desirable that this cause be brought to as speedy a hearing as possible, because of the many questions arising in the courts out of disputes between authors of plays and producing managers of stage plays, and producers of motion picture photoplays. Judge Mayer said that he thought opposition to advance the case should be withdrawn and all counsel should cooperate in asking the Supreme Court to place the case on the summary docket.

As the case is one which will not require extended argument, both parties now feel that the time of the Court will be saved and the interests of all concerned subserved by a hearing on the summary docket when called.

Respectfully submitted,

DAVID GERBER,

WILLIAM J. HUGHES,

Of counsel for Petitioner.

CHARLES H. TUTTLE,

Of counsel for Respondent.

NATHAN BURKAN,

Of counsel for Respondent's Licensee.

Famous Players-Lasky Corporation.

FILED

OCT 6 1919

JAMES D. MAHER,
CLERK.

No. 370

Supreme Court of the United States

October Term, 1919

J. HARTLEY MANNERS

Petitioner

v.

OLIVER MOROSCO

Respondent

**On Writ of Certiorari to the United States Circuit
Court of Appeals for the Second Circuit**

**MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION TO
ADVANCE AND TO PLACE ON THE SUMMARY DOCKET**

No. 370.

Supreme Court of the United States

OCTOBER TERM—1919.

J. HARTLEY MANNERS,

Petitioner,

v.

OLIVER MOROSCO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

MEMORANDUM IN OPPOSITION TO MOTION TO ADVANCE.

The respondent and his counsel cannot conscientiously consent to the petitioner's motion or concur in the statements on which it is based, to wit, that the questions presented will not require extended argument and are of particular consequence otherwise than to the parties.

Nor can we concur in the accuracy of the petition's summary of the contracts involved. We respectfully refer the Court to the full texts of the contracts of January 19, 1912, and July 20, 1914, which appear, respectively, at pages 13-17 and 117-122 of the record.

That the questions presented *will* require extended argument is shown by the fact that the record consists of 166 pages, and in the Circuit Court of Appeals the main brief of the petitioner and the brief of the respondent totalled 106 pages. Judge Ward dissented.

That the petitioner has heretofore regarded the questions presented as difficult is shown by his statement on page 4 of his petition for a writ of certiorari:

"A conflict between the decisions of the Federal Courts and between them and the decisions of the State Courts exist on the principal question presented."

Again on the same page, the petitioner said:

"This is the first case involving the questions presented to come before this Court."

The present case involves merely the interpretation of special clauses in a private contract and in a subsequent modifying contract. These clauses and these contracts are not at all likely to be reproduced, and present no question of general interest. So far as general principles are involved, they are well settled; for no one disputes that a general grant of the dramatic rights in a theatrical composition carries the motion picture rights, and that where the parties themselves have undertaken to define what rights are reserved other reservations will not easily be implied. The only issues are as to the application of these general principles and of the principles of construction to the unique and somewhat extended clauses of these two specially drawn contracts.

The suit is a peculiarly private controversy involving a peculiarly private and special issue.

CONCLUSION.

The motion to advance this cause and to place the same on the summary docket, should be denied.

Dated, New York, October 4, 1919.

Respectfully submitted,

CHARLES H. TUTTLE,
WILLIAM KLEIN,
Counsel for Respondent.

No. 1

370

FILED

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JAMES D. MAHER,
CLERK.

IN THE
Supreme Court of the United States,
OCTOBER TERM, 1918.

J. HARTLEY MANNERS,

Petitioner,

v.

OLIVER MOROSCO,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF
IN SUPPORT THEREOF.

WALTER C. NOYES,
DAVID GERBER,
WM. J. HUGHES,
Counsel for Petitioner.

IN THE
Supreme Court of the United States,
OCTOBER TERM, 1918.

J. HARTLEY MANNERS,
Petitioner,
v.
OLIVER MOROSCO,
Respondent.

No.

PETITION FOR WRIT OF CERTIORARI.

TO THE SUPREME COURT OF THE UNITED STATES:

The above named petitioner, J. Hartley Manners, prays for a writ of *certiorari* to review the decree of the United States Circuit Court of Appeals for the Second Circuit in the above entitled cause.

Questions Presented.

1. Whether a license contract to "produce, perform and represent" a dramatic work, which contract contained provisions relating to "theatrical seasons"; for the payment of royalties on gross weekly box office receipts; for the production of the "play" in first class theaters and on the road with a competent and satisfactory "company" and with a particular prominent actress in the title role; for rehearsals and production under the author's direction; providing that there should be no alterations, eliminations or additions made in the play without the approval of the author; for its release to stock

theaters in the event of failure in New York—all terms applicable to the spoken drama, but not to moving pictures—and which is silent as to any transfer of moving picture rights, nevertheless conveyed those rights from the author to the licensee.

2. Whether the contract gave a license in perpetuity or for a limited time only.

Statement of the Case.

The petitioner is a playwright, and author of a play entitled "Peg O' My Heart", duly copyrighted in the United States.

On January 19, 1912, petitioner and respondent entered into a contract under which the respondent was "to produce, perform and represent" the play referred to (R. pp. 13-17). For convenience the contract is set forth in the appendix hereto.

The respondent produced the play with a company of actors at his Burbank Theater in Los Angeles on May 28, 1912, where it ran for ten weeks, the leading character being played by Laurette Taylor, wife of petitioner, as provided by paragraph Sixth of the contract. The play was then brought to the Cort Theater, New York, where it ran for seventy-four weeks.

On July 20, 1914, the parties entered into an agreement modifying the contract of January 19, 1912, by the terms of which modification Miss Taylor was released from being required to appear in the principal role (R. pp. 117-118), and the respondent was permitted to produce the play with more than one company. After the execution of this agreement the respondent organized companies, seventeen in all, which produced the play during

the theatrical seasons of 1914-1915, 1915-1916, 1916-1917 in practically every prominent city in the United States. After the expiration of what petitioner contends was the duration of the license, the respondent announced his intention to use the play as the basis for the manufacture of a motion picture and to give and authorize the giving of motion picture performances of the play. Thereupon this suit was filed in the District Court of the United States for the Southern District of New York on August 26, 1918. It was tried and resulted in a final decree dismissing the bill on the merits on December 9, 1918. An appeal was taken to the Circuit Court of Appeals for the Second Circuit (Judges Ward, Hough and Manton), which affirmed the decree on April 17, 1919, Judge Ward dissenting on the question of the transfer of the moving picture rights.

Reasons for the Allowance of the Writ:

- (1) *The public character of the principal question involved, because it affects a large number of persons and an important class of contracts, in which the amounts involved are very large.*

The marvellous development of the moving picture industry has rendered of enormous value the screen rights in modern dramatic compositions. They concern numerous authors and producers throughout the country under outstanding contracts entered into for oral production by living actors and without any reference to moving picture presentation. Whether such screen rights passed from the author to the producer is of the greatest consequence to a large number of persons.

(2) *The absence of uniformity in the decisions of the courts.*

A conflict between the decisions of the Federal courts and between them and the decisions of the State courts exists on the principal question presented. This diversity of views largely grows out of misconceptions and misapplications of the decision of this Court in the case of *Kalem v. Harper* (222 U. S. 55). These differing views are shown in the accompanying brief. Furthermore the courts of England have expressed a view contrary to that of the Circuit Court of Appeals in the present case. A contract similar to the one in this case, therefore, entered into in England, would not carry moving picture rights, while the contract here, under the decision of the Circuit Court of Appeals, would carry such rights to the producer.

(3) *Copyright cases usually establish principles of wide application. The final determination of the principal question involved in this case will therefore tend to prevent litigation. The words "produce, perform and represent" involved in the present case appear in Section 1 (d) of the Copyright Act and have not yet been construed by this Court.*

For these reasons, and inasmuch as this is the first case involving the questions presented to come before this court, and inasmuch also as this is a class case typical in its facts of many others similar thereto, and because also it is insisted the decision is in conflict with the terms of the contract and the intent of the parties when it was made, it is submitted that a writ of *certiorari* should

issue and the questions involved be determined by this court.

WHEREFORE, your petitioner prays that a writ of *certiorari* may issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said court to certify the above cause to this court for review and determination, as provided by law, and that your petitioner may have such other and further relief in the premises as to this court may seem appropriate.

J. HARTLEY MANNERS,
Petitioner.

DAVID GERBER,
Attorney for Petitioner.

WALTER C. NOYES,
DAVID GERBER,
WM. J. HUGHES,
Of Counsel.

UNITED STATES OF AMERICA, }
Commonwealth of Massachusetts, } ss.
County of Norfolk.

J. HARTLEY MANNERS, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the petition and knows the contents thereof; that the facts therein stated are true to the best of his knowledge, information and belief.

J. HARTLEY MANNERS

Subscribed and sworn to before me this 14th day of May, 1919.

WILBERT D. FARNHAM, JR.
Notary Public. [SEAL]

My commission expires July 16, 1920.

UNITED STATES OF AMERICA, }
Southern District of New York. } ss.

DAVID GERBER, being first sworn on oath, deposes and says: That he is one of the attorneys for the petitioner named in the foregoing petition by him subscribed as attorney for such petitioner; that he knows the contents of said petition, and that the facts therein stated are true to his knowledge.

DAVID GERBER

Subscribed and sworn to before me this 15th day of May, 1919.

THOMAS F. GARRITY [SEAL]

Notary Public, Kings County No. 21
Certificate filed in New York County No. 38
Kings County Register's No. 135
New York County Register's No. 10029
Commission expires March 30th, 1920

We hereby certify that we have examined and read the foregoing petition for writ of *certiorari*, and that in our opinion such petition is well founded and should be granted by this Honorable Court, and that said petition is not filed for delay.

WALTER C. NOYES,
DAVID GERBER,
WM. J. HUGHES,
Counsel for Petitioner.

May 15th, 1919.

Appendix.

CONTRACT.

"AGREEMENT made and entered into this Nineteenth day of January, one thousand nine hundred and twelve, between J. HARTLEY MANNERS of the City, County and State of New York, party of the first part, and OLIVER MOROSCO, of the Burbank Theatre, Los Angeles, California, party of the second part.

WITNESSETH :

WHEREAS the party of the first part is the sole and exclusive author and owner of a certain dramatic composition at present entitled 'Peg O' My Heart' and

WHEREAS, the party of the second part wishes to obtain the exclusive right and license to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

NOW THEREFORE in consideration of the premises and of the mutual covenants and promises of the parties of these presents hereinafter contained and in consideration of the sum of One Dollar, lawful money of the United States, this day by each of the parties hereto to the other in hand paid, the receipt whereof is hereby reciprocally acknowledged, and for other good, valuable and adequate consideration it is hereby understood, covenanted and agreed by and among the parties to the agreement as follows :

FIRST: The party of the first part hereby grants and by these presents hereby does grant to the party of the second part subject to the terms, con-

ditions and limitations hereinafter expressed, sole and exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

SECOND: The party of the second part in consideration of such grant hereby agrees to pay to the party of the first part the sum of Five hundred (\$500.00) dollars upon the signing and execution of this agreement, the receipt whereof is hereby acknowledged, and which sum shall be in advance of the royalties to accrue to the party of the first part under this agreement, and is to be returned to the party of the second part under any circumstances whatsoever, but is to be credited as the payment of the first royalties hereinafter provided, if the said play shall be produced by the said party of the second part under this agreement.

THIRD: The party of the second part agrees to produce the play not later than January first, 1913, and to continue the said play for at least seven or five performances during the season of 1913-14, and for each theatrical season thereafter for a period of five years.

FOURTH: The party of the second part further agrees to pay to the party of the first part not later than the first Wednesday following each and every week during which a performance of the said play shall have been given, further sums as royalties as follows:

Five per cent (5%) of the first four thousand five hundred (\$4500) dollars gross weekly receipts; seven and one half (7½) per cent on the next thousand (\$2,000) dollars gross weekly receipts; and ten (10%) per cent on all sums over the amount of six thousand five hundred (\$6,500)

lars gross weekly receipts—which said sum of money, together with certified box-office statements, the party of the second part agrees to send to the party of the first part.

FIFTH: The said party of the second part further agrees that if during any one theatrical year, such year to begin on the first day of October, said play has not been produced or presented for seventy-five performances, then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part.

SIXTH: It is further agreed that the said party of the second part shall present the said play in first class theatres with a competent company, the said company to be mutually satisfactory to both the parties to this agreement, and with Miss Laurette Taylor in the title role of 'Peg O' My Heart' and that the play will have a production in New York City and will be continued on the road with Miss Taylor in the part of 'Peg' for at least one season or longer if considered advisable by both parties to this agreement.

SEVENTH: No alterations, eliminations or additions to be made in the play without the approval of the author.

EIGHTH: The rehearsals and production of the play to be under the direction of the author.

NINTH: The name of the author to appear on all advertising, reading and printed matter used in connection with the play.

TENTH: The author to have the right to print and publish the play, but this right is not to be exercised by the author within six months after the production of said play in New York City un-

less the written consent of the manager has first been obtained.

ELEVENTH: Said manager does hereby agree that he will not lease, sub-let, assign, transfer or sell to any person or persons, firm or corporation any of his aforesaid rights in and to the said dramatic composition or play without the written consent of said author has first been obtained. Should the play fail in New York City and on the road it is agreed between both parties it shall be released for stock.

TWELFTH: Whenever the play is released for Stock the royalties received from the Stock Theatres to be divided equally between the party of the first part and the party of the second part.

THIRTEENTH: This agreement is binding upon the parties hereto, upon their heirs, executors, assigns, administrators and successors.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

In the presence of

.....

.....

J. HARTLEY MANNERS (L. S.)

OLIVER MOROSCO (L. S.)

It is further agreed that after Miss Taylor shall have finished her season in 'Peg O' My Heart' as provided for in this contract, her successor in the role of 'Peg' for any subsequent tours shall be mutually agreeable to both parties to this contract.

**J. HARTLEY MANNERS,
OLIVER MOROSCO."**

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The author of a copyrighted drama granting a license to produce the play does not thereby part with the motion picture rights, unless expressly or impliedly granted. The Court below misconstrued and misapplied the decision of this Court in the Kalem case (222 U. S. 55).

All rights possessed by the owner of a copyright remain in him, except such as he expressly or impliedly parts with by the terms of the license.

What has been granted in the contract under discussion was the exclusive right to "produce, perform and represent" the said play in the United States of America and the Dominion of Canada, *subject to the terms, conditions and limitations* thereafter expressly in said contract contained.

The limitation expressed in the contract, by its terms, is the limitation to produce the play in spoken drama. To emphasize this, we need but refer to one paragraph of the contract, in addition to those more particularly specified in our present petition, *i. e.*,

"No alterations, eliminations or additions to be made in the play, without the approval of the author" (R. p. 109, fol. 326).

A photo-play has no dialogue. There are no actors to speak lines. It is a screen reproduction of a panto-

mimic performance before a camera. Shakespeare would not be Shakespeare if performed in pantomime.

A license, therefore, which provides against elimination of dialogue, cannot be construed to impliedly grant the right to give a production which eliminates all dialogue.

Under the construction of the license by the court below, the defendant could have given seventy-five screen or motion picture performances of the play each season. Had he never produced it with living actors it would have been a compliance with the provisions of the license as so construed. The right to "produce, perform and represent" must be read in connection with the limitations specified in the license.

This Court rendered the initial decision in this class of cases in *Kalem v. Harper*, 222 U. S. 55, when copyright cases were appealable of right. In that case, the question was whether a motion picture production was a dramatization of a book, and this Court held that it was. This decision is nearly always referred to by the courts in these cases, but there is, apparently, much diversity of opinion as to its meaning. This is well illustrated in the opinions of the two courts which heard the present case. Judge Mayer in the District Court said, with respect to the word "produce": "When used alone that word has a definite meaning by virtue of *Kalem v. Harper*." The meaning of the word "produce" is not even referred to in the *Kalem* decision. The learned Judge also says, in discussing the clause in the present license against alterations of the play, that the suggestion that such clause has any bearing "is not persuasive in view of the *Kalem* * * * cases". But no such question was involved or

considered in the *Kalem* case. The Circuit Court of Appeals, in its opinion, also referred to the *Kalem* case as having been its authority in a previous case (*Klein v. Beach, supra*) for holding that the *grant of a license of dramatic rights, if narrowed by other limitations, did not include motion pictures, while in the present case, directly the opposite is held.* The court said, in effect, that the limitations did not restrict the granting clause. As matter of fact, the *Kalem* case has nothing to do with either proposition.

The difficulty is that the courts apply the *Kalem* decision to matters quite beyond its scope. They treat a decision construing the *copyright law* as if it interpreted a *contract*. Because the conclusion that a motion picture production amounts to a dramatization, is not a reason why a license to produce a play should include motion picture rights; all depends upon what the parties intend by their contract. We respectfully urge that it would be highly advantageous to authors, dramatists, play producers, book publishers, as well as to motion picture manufacturers, if the opinion of this court in the *Kalem* case, construing the law, could be supplemented by a decision determining the rights of parties under contracts made thereunder.

It is obvious from what the parties said in their contract under discussion that what they had in mind was the spoken drama. Every line is consistent with a stage performance. There is not a line which fits a motion picture performance. If the Courts had considered the contract as a whole they never could have held that the parties intended to include motion picture rights. The Circuit Court of Appeals (and the District

Court), however, applied technical rules of construction under the evident belief that they were required to do so by the decision of this Court in the *Kalem* case. They place stress upon the mere granting language, and disregard all the rest of the contract. They say that the words "the sole and exclusive license and liberty to produce and perform said play" have received judicial construction and cite *Frohman v. Fitch*, 164 App. Div. 231. But the words quoted were applied in an absolute grant and not in a license, and other provisions made it clear that a general assignment of all rights was intended. The words quoted, however, were *exactly* those of *Klein v. Beach*, 239 Fed. Rep. 108 (affirming 232 Fed. Rep. 245), where the Circuit Court of Appeals itself held that, on account of further language used, the license did *not* include motion picture rights.

The real question in this case is whether the decisions of this Court have placed an iron-clad interpretation upon certain words so that nothing else matters. In effect the lower courts say on account of the decision of this Court, that a grant of a license to produce a play must stand like the granting clause of a warranty deed and cover all possible rights regardless of all subsequent limiting provisions. On the other hand, we contend that these contracts should be considered like other contracts, and all provisions weighed in order to ascertain the intentions of the parties.

By the amendment to Section 5 of the Copyright Act (approved August 24, 1912, 37 Stat. 488), motion picture photo-plays are classified in subdivision 1, as distinct from dramatic or musical compositions (subdivisions d and e). These rights are separable; "there might be a

copyright for a dramatization of the old sort (acted on a stage), and also a copyright for a dramatization of the new sort (arranged in motion pictures)."

Photo-Drama Motion Picture Co. vs. Social Uplift Corporation, 220 Fed. 448-449.

This would enable the defendant to secure a separate copyright of the motion picture representation, distinct from the copyright of the petitioner, and this under a contract by which he undertook to perform the play written by the author, without making any alteration, elimination or addition, and under a license which specified in detail, and with some elaboration, the limitations and restrictions under which the performance is licensed.

For the convenience of the court, we have, in the appendix, prepared a parallel column of the essential paragraphs of the contract in the *Klein-Beach case*, and the one under discussion, to indicate the conflict which, we contend, has been created, and the perplexities which now confront authors, play producers, motion picture manufacturers and exhibitors, in determining the rights of the various parties in connection with a dramatic composition, and of dramatists in connection with books, stories and other literary productions.

The effect of the decree is that under a license "to produce, perform and represent" the play for seventy-five times each theatrical season for five years, the defendant has been awarded the right in perpetuity to produce the play in motion pictures, irrespective of the various provisions of the contract, to which reference has been made, and with no other obligation than to give or authorize the giving of said number of performances each theatrical season.

II.

The rulings upon the moving picture question present a particularly proper case for review by certiorari.

The Court below was divided upon the question of the moving picture rights. It was so divided because apparently its members disagreed upon the application of the decision of this Court in the *Kalem* Case (222 U. S. 55). Judge WARD said in his dissenting opinion that the words "produce, perform, and represent", had not received judicial construction so as to make them technical without reference to the terms of the production contract and said in effect that the *Kalem* Case did not so hold. Judge Manton reached the opposite conclusion and he also cited the *Kalem* Case as shown in the last point.

The decisions of the State and Federal Courts are conflicting. *Frohman vs. Fitch*, 164 A. D. (N. Y.) 231, is quite out of line with *Klein vs. Beach*, 239 Fed. 109, 232 Fed. 240. And yet in the present case we find the Court below disregarding its opinion in the latter case and accepting the former.

In England the Courts hold that a contract for "English performances" or "acting rights" does not include a production by means of cinematograph films.

Wyndham vs. A. E. Huebsch & Co., Ltd., Ganthony v. G. R. J. Syndicate, Ltd. ("The Author", Vol. XXVI, No. I of Oct. 1, 1915, pp. 16-17).

For these reasons we submit that the record submitted presents a proper case for the issuance of a writ of *certiorari* under the principles of *Forsyth vs. Hammond*, 166 U. S. 506; *St. Louis, etc., R. Co. vs. Wabash R. R. Co.*, 217 U. S. 247, and other cases.

III.

The license is not a grant of a right in perpetuity, as was held by the Court below.

The plaintiff contended that the term of the license was for a period of five years. The Court on the other hand ruled that the respondents' right was granted in perpetuity so long as he gave seventy-five performances during each theatrical year. We respectfully insist that such ruling was erroneous.

That which was granted to the respondent was a *license*. The agreement says "license and liberty to produce". This license was a personal one. The eleventh paragraph of the license provided that it should be non-assignable, which necessarily made it a personal license. This personal license was revocable at the option of the licensor for that is the elementary rule regarding such licenses where no specific term is designated and no obligation assumed by the licensee. But where a licensee has assumed obligations the law gives him time to fulfill them, and as this respondent agreed by the third paragraph of the license to produce the play for five years, he is to be regarded as having the right for that period, but

no longer. It should further be pointed out that paragraph first of the contract granted the respondent his license subject to the limitations of the contract, and that paragraph third which contained the five-year provision constituted a limitation of the license to that period.

IV.

The prayer of the petitioner should be granted.

New York, May 15th, 1919.

Respectfully submitted,

WALTER C. NOYES,
DAVID GERBER,
WM. J. HUGHES,
Counsel for Petitioner.

Appendix.

KLEIN-BEACH CONTRACT, set forth in 232 Fed. 242.

1. The novelist (Rex Beach) grants to the author (Klein) the sole and exclusive right to dramatize the book for presentation upon the stage.

2. The author and the novelist grant to the manager (Author's Producing Co.) subject to their terms, conditions and limitations, the sole and exclusive license and liberty to produce, perform and represent the said play or dramatic composition on the stage, in the United States of America and the Dominion Canada.

3. \$1,000. paid as advance royalties.

4. The royalties for the said play were to be a sum equal to, etc.

CONTRACT UNDER DISCUSSION.

1. The author (Manners) grants to Morosco, *subject to the terms, conditions and limitations expressed*, the sole and exclusive license and liberty to produce, perform and represent *the said play* in the United States of America and the Dominion of Canada.

2. \$500. paid as advance royalties.

4. Morosco agrees to pay Manners, as royalties, a percentage of the gross weekly

KLEIN-BEACH CONTRACT,
set forth in 232 Fed. 242.

6. Neither the contract nor the rights granted to the manager shall be assigned, nor the play sublet by the manager, without first receiving the consent in writing of the author and novelist.

7. If the play is produced in stock theatres, royalties shall be divided.

8. Play to be produced only in first-class theatres and in a first-class manner with a competent cast, to be selected or approved by the author and novelist; author to stage the play for production by the first company.

CONTRACT UNDER
DISCUSSION.

receipts (a provision which Judge Hough, in *Harper v. Klaw*, said was "confessedly incapable of application to any method of producing photo-plays in commercial use or known to witnesses or counsel" (232 Fed. 612).

11. Manager shall not lease, sub-let, etc. his rights in the dramatic composition or play, without the written consent of the author.

11. Should the play fail in New York and on the road it shall be released for stock.

12. Whenever the play is released for stock, royalties from the stock theatres to be equally divided.

6. The play to be performed in first-class theatres with a competent company, company to be mutually satisfactory to both parties, with Miss Laurette Taylor in the title role; the play to have a production in New York City, and continued

KLEIN-BEACH CONTRACT,
set forth in 232 Fed. 242.

9. Manager agrees to produce the play for a consecutive run, on or before November 17, 1912.

10. Manager agrees to announce on all advertising matter that the play is a dramatization by Charles Klein of the Rex Beach novel "THE NE'ER DO WELL."

11. The Manager agrees that no alterations, eliminations, emendations, changes or additions of any sort whatsoever shall be made

CONTRACT UNDER
DISCUSSION.

on the road, with Miss Taylor in the part, for at least one season or longer, if considered advisable by both parties to the agreement.

8. *The rehearsals and production of the play to be under the direction of the author.*

3. Morosco agrees to produce the play not later than January 1, 1913, and to continue the said play for at least seventy-five performances during the season of 1913-1914, and for each theatrical season thereafter for a period of five years.

9. The name of the author to appear upon all advertising, reading and printed matter used in connection with the play.

7. No alterations, eliminations or additions to be made in the play without the approval of the author.

KLEIN-BEACH CONTRACT,
set forth in 232 Fed. 242.

in the text of the said play,
without the consent of the
author first obtained in
writing, and the author
agrees to make such rea-
sonable changes or modi-
fications as may be mutually
considered by the author
and manager necessary.

CONTRACT UNDER
DISCUSSION.

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1918.

J. HARTLEY MANNERS,
Petitioner,
v.
OLIVER MOROSCO,
Respondent.

No.

TO CHARLES H. TUTTLE and WILLIAM KLEIN, counsel for
the above named respondent, and to the above named
respondent:

PLEASE TAKE NOTICE that we shall file in the Office
of the Clerk of the Supreme Court of the United States
the foregoing petition for writ of *certiorari* and brief,
together with the printed record in the above entitled
cause, and that we shall, on the 2nd day of June, 1919,
submit the petition to the Court.

WALTER C. NOYES,
DAVID GERBER,
Counsel for Petitioner.

Received a copy of the foregoing notice and of the
petition for writ of *certiorari* and brief referred to therein,
this 16th day of May, 1919.

William Klein
Charles H. Tuttle
Counsel for Respondent.

Office Supreme Court, U. S.
FILED

MAY 31 1919

No. 1031370

JAMES D. WAHER,
CLERK.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1918

J. HARTLEY MANNERS

Petitioner

v.

OLIVER MOROSCO

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

CHARLES H. TUTTLE

WILLIAM KLEIN

Counsel for Respondent

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

J. HARTLEY MANNERS,
Petitioner,

against

OLIVER MOROSCO,
Respondent.

BRIEF FOR RESPONDENT.

The petitioner seeks a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit to review the affirmance of a decree dismissing on the merits a bill of complaint in an equity action. The trial was in the District Court for the Southern District of New York before Judge Mayer, whose opinion appears at page 147 of the Record.

The bill of complaint purports to set forth two causes of action:

First, for threatened infringement of the plaintiff's copyright in the play "Peg o' My Heart," obtained in July, 1918. The bill charges that the defendant intends to give motion picture representations of the play (fol. 6-36).

Second, for a threatened unauthorized use of the play, both on the stage and in motion picture form (fols. 36-93).

The relief demanded is that the defendant be restrained—

(1) From playing, producing or controlling in any manner "Peg o' My Heart;" and

(2) From manufacturing and presenting any motion picture based upon "Peg o' My Heart" (fol. 94-100).

Notwithstanding the extraordinary extent of the complaint and the array of subsidiary charges which it marshalls, the plaintiff's claims have, upon the trial and the brief, boiled down to the interpretation of the two contracts: the one dated January 1, 1912 (fol. 38), and the other dated July 20, 1914, modifying the former (fol. 55).

The only claims which the petitioner presses as reasons for allowing this extraordinary writ are, in substance:

(1) That the grant of the right "to produce, perform and represent" the play did not carry with it the right of production and representation in motion picture form.

(2) That the defendant's rights under these contracts terminated automatically with the period of dramatic seasons specified in paragraph Third of the earlier contract (fol. 43).

In the foregoing statement we have emphasized the existence of the contract of July 20, 1914 (Rec. p. 117-121), which radically modifies the contract of January 19, 1912, because the petition and the

brief in support thereof proceed as if the contract before the Court were solely the earlier contract of January 19, 1912. That contract alone is printed as an appendix to the petition, and in the appendix to the brief that contract is the one from which the excerpts are made, and which is printed under the title "Contract under Discussion." Indeed, the later contract of July 20, 1914, is referred to only at one place in the petition and brief, *i. e.* on page 2; and its mention there is most casual, and is expressed as if the only effect of the later contract were to release Miss Taylor from being required to appear in the principal role, and to permit the defendant to produce the play with more than one company. On the contrary, this later agreement covers the whole field of the relationship between the plaintiff and the defendant, and accomplishes modifications far more important to this controversy than the two mentioned in the petitioner's printed book.

POINT I.

The exercise of the exceptional power to issue a writ of certiorari is without precedent in such a case as this. The case involves merely the interpretation of special clauses in a private contract, not at all likely to be reproduced and presenting no question of general interest. So far as general principles are involved, they are well settled.

In *Hamilton Shoe Co. v. Wolf Bros.*, 240 U. S., 251, this Court said concerning the nature of its jurisdiction to review by certiorari (p. 258):

"As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *Lau Ow Bew, Petitioner*, 141 U. S., 583, 587; *In re Woods*, 143 U. S., 202; *Lau Ow Beu v. United States*, 144 U. S., 47, 58; *Amer. Const. Co. v. Jacksonville Ry.*, 148 U. S., 372, 382; *Forsyth v. Hammond*, 166 U. S., 506, 514; *Fields v. United States*, 205 U. S., 292, 296."

In the present case, nothing is involved except a unique private contract, which three judges have interpreted one way, and one, another.

(1) It is a mistake to say that "the decisions of the state and federal courts are conflicting." The nearest approach to the present contract in the reported cases is the contract construed in *Frohman v. Fitch* (164 App. Div., N. Y., 231). There the Appellate Division of the Supreme Court of the State of New York held, precisely as did United States Circuit Court of Appeals in the present case, that the motion picture rights were included in the broad grant of the producing rights. The case of *Klein v. Beach* (239 Fed., 109, 232 Fed., 240) is not in conflict with the *Frohman* case, and the opinion therein expressly so declares (239 Fed., 108, 109).

"The plaintiff insists, in view of *Kalem Co. v. Harper* (222 U. S., 55) and *Frohman v. Fitch* (164 App. Div., 232), that dramatic rights include motion picture rights. If used alone, that is doubtless true."

So, likewise, in the *Klein* case Judge Mayer (who was the trial judge in that and the present cases and whose decisions have in each case been

affirmed by the Circuit Court of Appeals), held that his opinion was in no way in conflict with *Frohman* case and said (232 Fed., 240, 246) :

"In *Frohman v. Fitch* (164 App. Div., 232), Fitch, who had agreed to write and deliver a play, had sold his original work to Frohman under a broad grant which clearly comprehended the ownership of Fitch's work by Frohman for all purposes."

The reason why the result reached in the *Frohman* case was not reached in the *Klein* case, is carefully pointed out in the opinion of Circuit Court of Appeals in the *Klein* case (p. 109); and is that the grant in the *Klein* case was solely of the right to dramatize the book "for presentation on the stage.". Since the preambles expressly drew a distinction between "the dramatic rights" as a whole and the narrower right to produce "for presentation on the stage," the limitation of the granting clause to the narrower right, was construed as confining the grantee to representation on the stage as distinct from representation on the screen. In the present case, however, the reverse is the fact, and no distinction is made between the producing rights which the plaintiff had and those which he conveyed, except in the single particular which the parties themselves were careful to define, to wit, the right reserved to the plaintiff to publish the play in book form under certain conditions designed to prevent competition between the book and the dramatic representation (fol. 48).

The obvious reconciliation between the *Klein* case and the *Frohman* case is thus pointed out

in the opinion of the Circuit Court of Appeals in the present case (Rec., p. 164):

"Appellant, however, says that *Klein v. Beach* (239 Fed. Rep., 108) supports his views. In that case, it was recited, 'Whereas the manager wishes to engage the services of the author to dramatize the said book for presentation on the stage' and the novelist granted to the author 'the sole and exclusive right to dramatize the said book for presentation on the stage,' and the parties agreed to grant to the manager 'the sole and exclusive license and liberty to produce, perform and represent the said play or dramatic composition on the stage,' the right to dramatize the novel for presentation on the stage was held not to carry the right to produce in motion pictures. This court, in considering *Klein v. Beach*, *supra*, said: 'The turning point in this case is the scope of the grant whether by its terms it conferred upon *Klein* the dramatic rights in the larger sense including presentation not only by living actors, but also by motion pictures or whether it was limited to the stage proper.' This court approved *Frohman v. Fitch*, *supra*, and upon the authority of *Kalem v. Harper* (222 U. S., 55) stated that the dramatic rights included motion picture rights, but such a conveyance of dramatic rights to have such meaning, cannot be narrowed by other limitations. In *Klein v. Beach*, *supra*, stagerights only were granted, and this was made plain in the preamble and the provisions of the contract. This court there said in so holding: 'In general it is quite clear that this was the prevailing purpose of the parties.'"

(2) Nor is there any conflict in the present case between decisions "of federal courts of different circuits." Both the *Klein* case and the present case

were decided by the same Circuit Court of Appeals. Judge Mayer who sat as trial judge in both cases has said (Rec., p. 156):

"The question in *Klein v. Fitch*, *supra*, was whether the additional words 'have presented on the stage' and 'on the stage,' construed with their context, meant the spoken play."

In distinguishing the *Klein* case, the Circuit Court of Appeals in the present case says (Rec., p. 165):

"In the case at bar, no distinction is made between the producing rights which the appellant had and those which he conveyed, except where the parties themselves defined it, such as in paragraph Tenth, to wit, reserving the right to publish the play in book form under the conditions there expressed."

(3) Consequently, the present case does not fall within any of the narrow categories where the exceptional power to issue a writ of certiorari is exercised.

No one disputes the general principles which are involved, to wit, that a general grant of the dramatic rights carries the motion picture rights, and that where the parties themselves have undertaken to define what rights are reserved other reservations will not easily be implied. The only issue is as to the application of these general principles to the special contract here involved. The suit is a peculiarly private controversy involving a peculiarly private and special issue.

POINT II.

There has been no diversity whatsoever as to the decision of this Court in *Kalem v. Harper* (222 U. S., 55), and that decision, so far from aiding the petitioner, works directly against him.

(1) The petitioner's memorandum says (p. 12):

"There is, apparently, much diversity of opinion as to its meaning. This is well illustrated in the opinions of the two courts which heard the present case. Judge Mayer, in the District Court said, with respect to the word 'produce': 'When used alone that word has a definite meaning by virtue of *Kalem v. Harper*.' The meaning of the word 'produce' is not even referred to in the *Kalem* decision."

This seems to us to put an unwarranted twist upon a single sentence in the opinion of Judge Mayer, where the word "produce" was obviously used as a brief synonym for the words to "produce perform and represent," which the learned Judge in the immediately preceding sentence had just quoted from the granting clause in the present contract (Rec. p. 156). The fact is that the opinion of this Court in the *Kalem* case is taken up with the construction of two of these very words, *i. e.*, "perform" and "represent," as used in the copyright law. That we are right in this is shown by the following quotation from the brief of Mr. David Gerber (one of the counsel for this plaintiff) in the case of *Frohman v. Fitch* (164 App. Div., 231), where he was supporting the opposite of his pres-

ent contention, and where he desired to repel an attempt to distinguish the *Kalem* case (p. 9):

"The Court in that case [the *Kalem* case] construed the words '*performance*' and '*representation*' of a drama in the statute, while this Court has before it the same question on the construction of the same words in the contract."

Indeed, Judge Mayer's reference to the meaning of a grant of the producing rights, if it stands alone, was taken almost bodily from the opinion of the Circuit Court of Appeals in the *Klein* case, on which the petitioner now so much relies. In that opinion it is said (p. 109):

"The plaintiff insists, in view of *Kalem Co. v. Harper* (222 U. S., 55) and *Frohman v. Fitch* (164 App. Div., 232) that dramatic rights include motion picture rights. If used alone that is doubtless true."

(2) By way of further effort to sustain the thesis of a diversity of opinion as regards the *Kalem* decision, the petitioner's memorandum says (p. 13):

"The Circuit Court of Appeals, in its opinion also referred to the *Kalem* case as having been its authority in a previous case (*Klein v. Beach, supra*) for holding that the grant of a license of dramatic rights, if narrowed by other limitations, did not include motion pictures, while, in the present case, directly the opposite is held."

Neither of these statements is correct. What the Circuit Court of Appeals in the present case really said concerning these two decisions was this (Rec., p. 165):

"This Court [in the *Klein* case)] approved *Frohman v. Fitch*, *supra*, and upon the authority of *Kalem v. Harper* (222 U. S., 55), stated that the dramatic rights included motion picture rights, but such a conveyance of dramatic rights to have such meaning, cannot be narrowed by other limitations."

Obviously, this is a correct exposition of the holdings in both the *Klein* and *Kalem* cases, for unquestionably the *Kalem* case did hold that, generally speaking, dramatic rights included motion picture rights, and the *Klein* case quite correctly so interpreted the *Kalem* case; but, on the other hand, the *Kalem* case does not hold that a grant of the dramatic rights would include the motion picture rights, notwithstanding other limitations showing a contrary intention, as was the fact in the *Klein* case, where the grant expressly was confined to stage rights.

It approaches the absurd to say that, in the present case, the Circuit Court of Appeals held that a grant of dramatic rights "if narrowed by other limitations" would, nevertheless, necessarily include motion picture rights. All that the court held was that there were here no limitations which excluded the motion picture rights, but that, on the contrary, when the parties did undertake themselves to define what rights were excluded from the grant, they expressly limited them as follows (Rec. on Appeal, p. 149):

"Tenth.—The author to have the right to print and publish the play, but this right is not to be exercised by the author within six months after the production of said play in New York City unless the written consent of the manager has first been obtained."

(3) The petitioner's memorandum further says (p. 13):

"The difficulty is that the courts apply the *Kalem* decision to matters quite beyond its scope. They treat a decision construing the copyright law as if it interpreted a contract."

The answer to this proposition is that given by the learned counsel himself, in his brief in the *Frohman* case, when on the opposite side of his present proposition (p. 9):

"The Court in that case [the *Kalem* case] construed the words 'performance' and 'representation' as used in the statute, while this Court has before it the same question on the construction of the same words in a contract. Plaintiff acquired in this case by contract precisely what Klaw and Erlanger secured under the statute in the case cited, by arrangement with the author and owners of the copyright of Ben Hur."

POINT III.

The contract between the parties clearly conferred upon the defendant, as part of the production rights, the right to produce the play in motion picture form.

The granting clause of the contract of January 19, 1912, was, by its very terms, absolute and inclusive of all producing rights: (a) because it conveyed all the producing rights without exception; and (b) because it recited that the rights conveyed were "exclusive of all other producing rights."

The word "represent" is peculiarly appropriate to a motion picture representation of a play. Ordi-

narly, one may "produce" or "perform" a spoken play upon the stage, but one does not necessarily speak of "representing" such a play, whereas it is a common expression to speak of "representing" a play in motion pictures.

Like the granting clause, the two recitals (fol. 42) make plain the purpose of the agreement to place the plaintiff in the position of author and the defendant of producer, and to give the latter the sole right of placing the play before the American public in each and every form which constitutes its production or representation.

The certainty that the parties had no intent to make any reservation not expressed is heightened by the fact that in Paragraph Tenth of the contract (fol. 48) they reserved to the plaintiff the right to print and publish the play in book form, but only on such conditions as would prevent competition between the grantor's book rights and the grantee's production rights. This reservation is doubly significant. In the first place, the parties therein directed their attention to a definition of the rights of representation reserved to the plaintiff, and confined those rights to mere publication in book form. In the second place, the defendant was so solicitous that there should be no competition between representation by him and representation by the plaintiff, that even this right of publication was to cease upon production of the play in New York. It is absurd to suppose that the parties intended that this plaintiff, who was thus prevented even from publishing the play in book form during its New York run, could have produced it in New York in motion picture theatres for five and ten cents admission, while the

defendant was trying to make a success of it in the same city at two dollars a seat (fols. 219, 220).

The courts will not easily accept a construction which would permit the plaintiff to produce motion pictures in competition with the defendant's production on the stage. The plaintiff drove the unusually favorable bargain of reserving ten per cent. of the gross (not net) receipts, and thus stood to win even if the defendant lost money; but such terms implied that the plaintiff conveyed rights which inherently contained the promise and possibility of profits to the defendant, and made no reservations, mental or otherwise, which would enable the plaintiff at will to render the contract unprofitable to the defendant, or to take for himself the benefit of any popularity which the defendant should build up for the play by the investment of his time, reputation and money.

The supplemental contract of July 20, 1914, further illustrates the intent of the parties to transfer to the defendant the ownership of the play for all production purposes. It removes the prohibitions in the original agreement upon the defendant's leasing, subletting, assigning or selling (fol. 70); removes the requirement as to Laurette Taylor being in the title role; and allows the defendant to employ as many companies as he might see fit—the paragraph expressly stipulating that the defendant "is hereby given sole and exclusive charge and control" (fol. 66).

The unbroken tenor of judicial decisions interpreting similar agreements establishes incontestably that the motion picture rights were included.

Frohman *v.* Fitch, 164 App. Div. N. Y.,
231;

Lipzin v. Gordin, 166 N. Y. Suppl., 792;
Hart v. Fox, 166 N. Y. Suppl., 793;
Photo-Drama Motion Picture Co. v. Social
Uplift Corp., 220 Fed., 448, 458;
Kalem v. Harper Bros., 222 U. S., 55, 61;
Universal Film M. Co. v. Copperman, 218
 Fed., 577, 581;
Liebler & Co. v. Bobbs-Merrill Co., 162
 App. Div., 900;
Drone on Copyright, p. 588;
Brackett's Theatrical Law, p. 61.

The claim that there is some repugnancy between the provisions for royalties and a production in motion picture form is unwarranted. Such production has its gross weekly receipts, precisely as does the spoken production. If the defendant produced on the screen he could quite as easily pay a percentage of his gross weekly receipts to the plaintiff as if he produced on the stage; and if he availed himself of his right under the modifying contract to let out such right of production, the plaintiff's right to the stipulated royalties (it was expressly agreed) would not be affected thereby (fol. 64).

Nothing in the provision in Paragraph Seventh forbidding alterations, eliminations or additions to be made in the play without the approval of the author, prevents the operations of the granting clause as a grant of all production rights, including motion pictures. As pointed out by Judge Mayer, any such contention is "not persuasive in view of the *Kalem* and *Frohman v. Fitch* cases" (fol. 473); for, if a motion picture representation is something different as a dramatization from the play itself, then the Court, in the *Kalem* case,

should have held that there was no infringement, and the court in the *Frohman* case should have held that the motion picture rights were not included in the grant of the production rights of the play. Under Paragraph Seventh no alterations are to be made "in the play," as distinct from various methods of presenting the play to the public. Would the appellant claim that, because of this clause, the defendant could not have presented the play in pantomime by living actors upon the stage, or with the aid of a mirror? Yet these are the very tests which, in the *Kalem* case (221 U. S., 55, 61), this Court laid down for determining whether a motion picture presentation would be an infringement of the copyright of the play. In other words, Paragraph Seventh is a guarantee that the public are to see "the event or story lived" precisely as the plaintiff composed it, whether the presentation be by word of mouth, pantomime, reflection in a mirror, moving picture, or any other medium.

POINT IV.

The court below did not hold that the rights granted were in perpetuity. It merely held that they were not limited to the period of seasons specified in Paragraph Third of the original contract.

The Court below very correctly held that the rights conveyed were not a mere license in any technical, legal sense. To quote the opinion (Rec., p. 161):

"It [the contract] was not an agreement for personal service or for a mere license, but was

a bargain and sale of the sole and exclusive right to produce, perform and represent the said play in the United States and Canada. Property was thereby granted and conveyed. It may be intangible, but it has a value, and is the subject of proprietorship. It is not a conveyance which is revocable at will or for a temporary period, but for the time provided for in the terms of the contract, * * *. An agreement for production rights binding the parties, heirs, executors, assignees, administrators and successors, is an assignment, and not a mere license (*Photodrama Motion Picture Co. v. Film Corp.*, 213 Fed., 374; *aff'd* 220 Fed., 448).

In *Frohman v. Fitch*, 164 App. Div. (N. Y.), 231, 233, it was said of the grantee's rights under a similar contract:

"The contract, as we have seen, gave to the plaintiff the 'exclusive right to produce or to have produced the said play in the United States of America and in Canada.' This exclusive right was to protect the plaintiff in the property which he had purchased. That the plaintiff's rights under the contract constituted property cannot be questioned."

The argument that what was given was merely a revocable personal license and not a right, is totally unwarranted. By its very terms, it was a "right," as indicated in the second recital of the original agreement, expressing the wish of the defendant "to obtain the exclusive *right* and *license* to produce, perform and represent the said play." Moreover, the contract provides that if the play be not produced for the stipulated number of performances, then "all *rights*" of the defendant shall cease and

determine (fol. 45); and forbids any assignment by the defendant of "any of his aforesaid *rights* in and to the dramatic composition or play" without the plaintiff's consent (fol. 49). The modifying agreement, in its turn, provides that the defendant may lease, sublet, assign or sell "any of his *rights* acquired under the said original agreement or this supplemental agreement" (fols. 63-4).

Nor was the so-called license merely personal, for rights which may be leased, sublet, assigned, transferred or sold, singly or collectively, to any person, firm or corporation (fol. 63), and which bind not only the parties, but also their "heirs, executors, assigns, administrators and successors" (fol. 50), are in no sense merely personal.

Nor is the so-called license necessarily revocable (quite irrespective of the other provisions of the contracts), for, since it was bought and paid for and coupled with a continuing interest upon a continuing consideration connected with the enjoyment of the rights acquired, it was not revocable.

Paragraph Third of the original contract, upon which the petitioner so much relies, was not a grant by the plaintiff, but a covenant by the defendant. As well said by the court below, "it was a statement of the least that the defendant was to do, not of the most that he was to have." The object of the paragraph was to assure to plaintiff a *bona fide* and consistent attempt on the part of the defendant to make the play successful, and thus to furnish the plaintiff with substantial royalties.

The limitation of time expressed in Paragraph Fifth of the contract (fol. 45), excludes the implication of any other limitation of time. This paragraph provides that upon the defendant's

failure to present the play for seventy-five performances in any one theatrical year, then all rights of the defendant shall immediately revert to the plaintiff.

The entire harmony of Paragraphs First, Third and Fifth, and the purpose of the parties that the defendant's rights should not be limited to any fixed period of time, are further emphasized by the provisions of Paragraphs Eleventh and Twelfth, that should the play fail in New York City and on the road it might thereupon be "released for stock" and the royalties be equally divided (fol. 49). Paragraph Twelfth is elucidated in the modifying agreement of July 20, 1914, as follows (fol. 65):

"Twelfth.—Said play, 'Peg o' My Heart,' may be released for stock, in the United States and Canada, during the time that this contract is in force, whenever the net amount realized from all the companies producing the play in any one theatrical season shall yield a net profit of less than two thousand dollars (\$2,000)."

As the Court knows, and as the evidence makes plain, "stock" theatres are not "first-class theatres," and thus are not within the class of theatres wherein, by Paragraph Sixth, the defendant agreed to produce the play as long as its success continued (fols. 214-7). Paragraphs Eleventh and Twelfth, therefore, are proof that the parties contemplated production through the defendant after the period mentioned in Paragraph Third; and they mean, when read with Paragraphs Third and Fifth, that if the production of the play for the specified number of performances

in any one season is unprofitable, then it may be produced in stock theatres.

Paragraph Third is a guarantee by the defendant that he will produce for the specified number of seasons seventy-five performances a year in first-class theatres; and for the breach of that agreement, he would be liable in damages. Paragraph Fifth, on the other hand, while it supplies the cumulative remedy of forfeiture throughout the period covered by this guarantee, continues to be operative after that period has expired. In other words, the defendant was willing to assume a personal obligation for the fixed period specified in Paragraph Third, but intended afterwards to be merely under the penalty of forfeiture, which penalty was itself mitigated by the provision of Paragraphs Eleventh and Twelfth, that if the failure to produce the requisite number of performances in any one year was due to realizing a profit of less than \$2,000, the play could be released for stock, in which event the royalties would be divided equally, thus furnishing to both parties a measure of protection against loss.

Furthermore, the modifying contract constituted a plain recognition by both parties that the original contract was not limited to the period mentioned in Paragraph Third; and that the only question which was to be considered open after July 20, 1918, was whether that contract carried the motion picture rights. Paragraph Ninth of the modifying contract (fol. 66), is a complete demonstration that the parties regarded the production rights as continuing beyond 1918, and merely debated whether the motion picture rights were included among them.

Any construction of the contract as modified whereby it would be limited to the period of seasons mentioned in Paragraph Third of the original contract would be harsh and oppressive of the defendant. The bargain which the plaintiff drove not only threw upon the defendant the entire cost of producing the play and placing it before the public, but also the entire burden of such losses as might occur; while at the same time it compelled the defendant to pay heavy royalties—not out of the net profits—but out of the gross weekly receipts, according to a sliding scale ranging from five to ten per cent. The plaintiff now has the hardihood to claim that, in addition, this contract which thus assured him of substantial returns even though the defendant might lose money, also gave him the right to deprive the defendant of both the play and the rewards of hard-won success while such success was at its very zenith, and to take over and exploit for himself alone the entire investment which the defendant had made of his time, money and professional reputation.

POINT V.

The appendix attached to the petitioner's brief is not fair.

At page 15 of this brief, counsel say:

"For the convenience of the Court, we have in the appendix prepared a parallel column of the essential paragraphs of the contract in the *Klein-Beach* case and the one under discussion."

In our judgment, this appendix, which consists merely of counsel's own paraphrasing of selected paragraphs, omits many of the essential elements in both contracts. For example, it omits the preambles which were a determining point in the *Klein* case; and it omits the preamble in the present contract, which are the very opposite of those in the *Klein* case. It omits all of the provisions of Paragraph Tenth of the present contract (fol. 48), wherein the parties themselves expressly undertake to define what rights were reserved to the plaintiff. It recites as a term of the present contract, that the defendant shall not lease, sublet, etc., his rights; whereas the contract of July, 1914, provided for exactly the opposite (fol. 63). It omits Paragraph Ninth of the contract of 1914, which shows that the parties contemplated that the producing rights would extend beyond the period mentioned in Paragraph Third of the original contract. It omits the provision of the original contract that it shall be binding upon the heirs, executors, assigns, administrators and successors of both parties (fol. 50),—a clause absolutely negating the plaintiff's fundamental claim that what was given was merely a personal license. It inserts

the provisions of the original contract contemplating the appearance of Miss Taylor in the title role, and omits the provisions of the contract of 1914, striking out this restriction.

CONCLUSION.

The petition for writ of certiorari should be denied.

Dated, New York, May 29, 1919.

Respectfully submitted,

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Office Supreme Court, U. S.
DISTRICT

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No. 370.

Supreme Court of the United States,

OCTOBER TERM, 1919.

J. HARTLEY MANNERS,

Petitioner,

against

OLIVER MOROSCO.

BRIEF ON BEHALF OF PETITIONER.

DAVID GERBER,
WILLIAM J. HUGHES,
Counsel for Petitioner.

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Supreme Court of the United States,

OCTOBER TERM, 1919.

J. HARTLEY MANNERS,
Petitioner,

vs.

OLIVER MOROSCO,
Respondent.

No. 370.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT.

BRIEF FOR PETITIONER.

Statement.

The case comes before the court on a writ of *certiorari*, issued to the United States Circuit Court of Appeals for the Second Circuit.

The respondent rested on petitioner's case (Rec. p. 74), so that the record presents a question of law unembarrassed by disputed facts.

Petitioner, a playwright, wrote a drama to which he gave the title "PEG O' MY HEART" (Rec. p. 3), which play was duly copyrighted in July, 1918 (Plff.'s Ex. No. 2, p. 100; Plff.'s Ex. No. 3, p. 101).

It was written with the view of having the star or

principal part of "PEG" played by petitioner's wife, a prominent and successful actress, who appears upon the stage under her professional name of "Laurette Taylor" (Bill of Complaint, Rec. p. 13, not denied in answer; see Answer, Rec. p. 41).

At the time of making the contract (upon which the question before the court hinges), respondent operated a theatre in Los Angeles, California, known as the Burbank Theatre, in which he produced dramas with a company of actors for short runs (Bill of Complaint, par. 23, Rec. p. 18, not denied in the Answer, see Rec. pp. 41 42).

On January 19, 1912, the parties to this action entered into an agreement, set forth in the bill of complaint (par. 22, Rec. p. 13; Plff.'s Ex. No. 7, Rec. p. 107)—to which we will refer more at length in our argument on the law—by which respondent agreed "to produce the play not later than January first, 1913, and to continue the said play for at least seventy-five performances during the season of 1913-1914, and for each theatrical season thereafter for a period of five years" (Contract, par. 3, Rec. pp. 15, 108).

The accepted theatrical season commences about October 1st and terminates about April 30th of the following year (Rec. pp. 60, 61).

The play was produced by respondent at his Burbank Theatre, in Los Angeles, Cal., on May 28, 1912, with a company of actors, Laurette Taylor playing the leading character, and continued at said theatre for ten weeks (Complaint, par. 23, Rec. p. 18, not denied in Answer, Rec. pp. 41, 42).

It met with such great success that it was brought to New York City by respondent, and produced at the Cort Theatre, from December, 1912, to May 30, 1914, a total of 604 continuous performances (Com-

plaint, pars. 23-24, Rec. p. 18, not denied in Answer, see Answer, par. 8, Rec. p. 42).

On July 20, 1914, the agreement was modified by releasing Laurette Taylor from the principal or stellar role, and respondent was given permission to produce the play with more than one company, and relieved from the restriction against leasing, sub-letting or assigning any of his rights; without, however, affecting his personal liability for the royalties (Plff.'s Ex. No. 9, Rec. p. 117).

Respondent thereupon organized eight different traveling companies to produce the play during the theatrical season of 1914-1915, each company covering a distinct, but different, section of the United States or Canada.

During the theatrical season of 1915-1916, respondent organized four different companies, and during the season of 1916-1917, five companies, so that, within the period of five theatrical years, following January 19, 1912—the date of his contract—respondent produced the play in every city of the United States in which it could be played with any prospect of profit to him, realizing approximately one million dollars (Complaint, par. 25, Rec. p. 24, not denied in Answer, see Rec. p. 42).

After the close of the theatrical season of 1917-1918, respondent, claiming he had a right to produce the play—not with living actors, as he had done for five years—but by means of motion pictures, notified petitioner of his intention to exercise that alleged right. Thereupon this action for an injunction was commenced.

The difference between a drama produced by a company of living actors, and a photoplay projected upon a screen with the aid of a positive film and projecting machine, is set forth in the bill of

complaint (par. 14, Rec. p. 9) and not denied in the answer (see par. 5, Rec. p. 41), and is, of course, familiar to the court.

The learned trial judge held (1) that the contract of January 19, 1912, conveyed the motion picture rights in the play, to respondent and (2) that it was not limited in duration to the period of years or seasons specified in paragraph "third" of the contract (see Final Decree, Rec. p. 79).

The learned Circuit Court of Appeals divided on the question whether the contract did vest in respondent the motion picture rights. Two opinions were written, the prevailing one by Circuit Judge Manton (Rec. p. 159) and a dissenting opinion by Circuit Judge Ward (Rec. p. 163).

The learned trial judge and the learned judges of the Circuit Court of Appeals, in the three opinions written, respectively cite *Kalem v. Harper* (222 U. S. 55), but do not agree as to its proper application to contracts between authors and play producers. There is also a conflict between the decision in this case and the opinions of the English courts.

As counsel stated on the joint motion to place this case on the summary docket, many questions are arising in the courts out of disputes between authors of plays and producing managers of stage plays, and producers of motion picture photoplays.

ARGUMENT.

I.

Petitioner did not divest himself of his motion picture rights by the contract of January 19, 1912.

A.

The situation of the parties at the time the contract was entered into, and their acts in performance thereunder, are at war with the belated claim of respondent that he had the right to use the drama as the basis for a photoplay.

In January, 1912, the respondent was operating a theatre in Los Angeles, California, not a motion picture theatre, but for the production of plays with a company of living actors (Complaint, par. 23, Rec. p. 18).

The agreement is declared to be between petitioner and "Oliver Morosco, of the Burbank Theatre, Los Angeles, California" (Plff.'s Ex. No. 7, Rec. p. 107), at which theatre the play was first produced by respondent on May 28, 1912 (Bill of Complaint, par. 23, Rec. p. 18).

For five theatrical years thereafter, down to and including the theatrical season of 1917-1918, seventeen different traveling companies of living actors were organized by him, producing the play in every city of the United States in which the play could be performed with any hope of profit (Bill of Complaint, par. 25, Rec. p. 24, not denied in the Answer, Rec. 42; see also par. 27, Rec. p. 25; Answer, p. 42). Down to that time, there was no effort made to use the play for motion picture purposes.

B.

The contract is not a grant or *assignment*—but a *license* to produce the play in the United States and Canada, subject to “the terms, conditions and limitations” therein expressed, and *every* “term”, “condition” or “limitation” is applicable only to a production of the play as a spoken drama, and inappropriate to the use of petitioner’s literary work as the basis for a scenario for a photoplay or screen performance.

Every paragraph of the license (to which we will refer), sustains the statement of Circuit Judge Ward that he finds “*not a word in the contract indicating an intention to transfer the movie rights, though they were well known to both parties*” (Rec. p. 164).

In 1912, the motion picture industry was very well known in the theatrical profession. There were motion picture theatres devoted *exclusively* to giving photo-play performances in practically all the cities of the United States (Rec. p. 63). Indeed, this was so well known that the court in *Klein v. Beach* (232 Fed. Rep., bottom p. 244, top p. 245) took judicial notice of the fact.

(1) The *first paragraph* grants to respondent “subject to the terms, conditions and limitations” thereafter in the contract expressed, “the sole and exclusive *license* and liberty to produce, perform and represent the said play in the United States of America and the dominion of Canada” (Rec. p. 107).

It is not a sale of the play, nor an assignment, but

a license only circumscribed by terms, conditions and limitations.

Heap v. Hartley, 42 L. R. Ch. Div. 461 (1889).

The London Printing and Publishing Alliance, (Limited) v. Cox, 7 The Times Law Rep. 738 (1891) 3 Ch. 291.

Neilson v. Horniman, 26 The Times Law Rep. (1909) 188.

Stevens v. Benning, 1 Kay & Johnson's Rep. 168.

Tuck v. Canton, 51 L. J. N. S. (1882) (Part 2) pp. 363-365.

It was an authority to do lawfully that which otherwise would have been unlawful.

Paragraph "*Fifth*", providing for a *termination* of respondent's rights, in the event of a failure to give seventy-five performances during a theatrical season, and paragraph "*Eleventh*", prohibiting an assignment or sub-letting of the rights acquired, are wholly inconsistent with a sale or grant of the play.

Whatever was not expressly or by necessary implication granted, was reserved by and remained in the petitioner, and respondent's rights were limited to the restrictions of the license.

Lucas v. Cooke, 13 L. R. Ch. Div. 872 (1879-1880).

Heap v. Hartley, 42 L. R. Ch. Div. 461 (1889).

(2) Paragraph "*Second*" acknowledges the receipt of \$500. advance royalty, to be applied to the first royalties maturing under the contract.

(3) The "*third*" paragraph requires a production of the play not later than January 1, 1913, and to continue for at least seventy-five performances dur-

ing the season of 1913-1914, and for each theatrical season thereafter for a period of five years (Rec. p. 108).

A theatrical season, in connection with the spoken drama, is the period from October 1st to the following April 30th (Rec. pp. 60-61).

A company of actors engaged to travel from city to city for a theatrical season understand their employment to cover the period of the accepted season.

McIntosh v. Miner, 37 A. D. (N. Y.) 483.

There is no theatrical season in connection with a photoplay performance, consisting of a positive film, a projecting machine and a screen.

Circuit Judge Ward says: "The third article of the contract speaks of theatrical seasons, which exist for spoken, and do not exist for movie, plays" (Rec. p. 163).

See also *Law of Motion Picture and the Theatre*, p. 119.

The words "at least seventy-five performances" during each theatrical season has a definite meaning in connection with a theatrical company performing a play, but the film of a photoplay may be used any number of times during the day in a motion picture theatre, and *any number of films* may be used in different cities of the United States on the *same day*. What, in connection with such an entertainment, do the words "seventy-five performances during the theatrical season" mean? That number of performances might be given in less than one week throughout the United States in different motion picture theatres.

(4) The *fourth paragraph* provides for a royalty to be paid of five per cent. of the first \$4,500 of gross weekly receipts; seven and one-half per cent. on the

next \$2,000 gross weekly receipts; and ten per cent. on all sums over that amount of \$6,500 gross weekly receipts; which moneys, with certified box office statements, respondent agreed to send petitioner (Rec. p. 108).

The learned trial judge excluded all evidence offered by petitioner to establish the inappropriateness of this royalty provision in connection with a photoplay. It was sought to show that in 1912, the custom in connection with a photoplay was to lease the use of a film at a *fixed nightly rental* (Rec. p. 63), and that the manner in which the moving picture business was carried on rendered this method of measuring the royalty wholly inappropriate and inapplicable; but the evidence was not admitted (see Rec. pp. 63, 71; see also pp. 74-78).

We have, however, on this subject the terse and lucid language of Judge Hough in *Harper Brothers v. Klaw*, 232 Fed. Rep. 609 (bottom p. 612), where (referring to a similar provision) he says:

"The contract prohibits any change in the manner of performance or text, and *contains provisions as to royalties and their computation, confessedly incapable of application to any method of producing photoplays in commercial use or known to witnesses or counsel.* It is unnecessary to expand this thought. The whole arrangement made between the parties in 1899 is not only inconsistent with, but repugnant to, the thought of making 'movies' out of Ben Hur." (Italics ours.)

(5) The *fifth paragraph* protects petitioner against a failure by respondent to produce the play for seventy-five performances each theatrical year.

Here, again, as Judge Ward says, reference is made to "theatrical seasons".

(6) The *sixth paragraph* requires the production of the play in first-class theatres, with a competent company, the members of which were to be satisfactory to both parties, and with Miss Laurette Taylor in the title role of "Peg". Respondent undertook to have a production in New York, and then the play was to be "*continued on the road with Miss Taylor in the part of 'Peg' for at least one season or longer, if considered advisable by both parties.*" (Italics ours.)

Every word of this paragraph destroys the thought of a photoplay performance. It not only deals with a company of living actors, providing for the manner of their selection, but the play must be produced in New York and then *continued on the road* with Miss Taylor in the part of "Peg".

The cast of characters does not change in a film or photoplay.

(7) The *seventh paragraph* provides that "*no alterations, eliminations or additions shall be made in the play, without the approval of the author.*" (Italics ours.)

Had the parties desired *expressly* to exclude a photoplay performance no stronger language could be used than is found in this paragraph. If that were the only provision in the license, respecting the character of the production, it would be the death-knell to the belated claim advanced by respondent.

There is a pardonable pride of authorship in the dialogue of a play, which is "eliminated" and destroyed by a screen performance.

The petitioner had adopted playwriting as his profession (Bill of Complaint, par. 3, Rec. p. 3), and did not wish his work submitted to the public

under his name, excepting in the form in which he created it. A photoplay eliminates all dialogue. It is founded on a "scenario" which is but the skeleton libretto of the work, giving the general movement of the plot and the successive appearances of the principal characters.

Century Dictionary, p. 5384.

Encyclopedia Britannica, 11th Ed., Vol. 24, p. 306 (under word "scene").

Judicial opinions written in cases affecting motion pictures draw the distinction between a *play* and a "scenario" for a *photoplay*.

See:

Universal Film Mfg. Co. v. Copperman, et al., 218 Fed. Rep. 577-578.

Photo Drama Motion Picture Co., Inc., vs. Social Uplift Film Corporation, 213 Fed. Rep. 374-377.

New Fiction Publishing Co. vs. Star Co., 220 Fed. Rep. 994-995.

London v. Biograph Co., 231 Fed. Rep. 696-697.

Judge Learned Hand, in *Klein v. Beach*, 239 Fed. Rep. 108 (at p. 110), clearly draws the line between a "play" and a "scenario". Construing the contract in that case, he says:

"Klein was to make a play out of the book, and the Authors' Producing Company was to produce it; if they failed, Klein and Beach might try it together. There is no intimation that Klein should have further rights to make, not a play, but a motion picture scenario. Such a scenario is hardly a 'play' for 'presentation on the stage'. We have this language to construe at a time when the different require-

ments of 'screen' and 'stage' were well understood, and with them the need of writing two quite separate kinds of dramatization."

District Judge Mayer, before whom this case was tried, held that paragraph seventh refers not only to the spoken play, but to a motion picture reproduction of the spoken drama as well (see Appendix, opinion, in *Manners vs. Famous Players-Lasky Corporation*, December 11, 1919).

In the same opinion, the learned District Judge says that "it is obvious that a spoken play cannot be literally reproduced on the screen" (Appendix, p. 29).

How can a provision that there shall be "no eliminations" be applied to a performance that eliminates every word of the dialogue? A scenario of "Hamlet", thrown upon the screen, would destroy the work of the greatest master of the English language the world has ever known.

(8) The *eighth paragraph* requires "rehearsals and production of the play to be under the direction of the author" (Rec. p. 109).

The rehearsals were to be with a company to be selected by mutual consent, as provided in paragraph 6th, and the production, as provided in paragraphs 3rd, 6th and 9th, was to be under the direction of the petitioner.

This could not apply to "movie shows" (Opinion, Ward, C. J., Rec. p. 164).

(9) The *ninth paragraph* requires "the name of the author to appear on all advertising reading and printed matter used in connection with the play" (Rec. p. 109).

That provision could not apply to a moving picture production, which is based on a scenario, *not written by the petitioner*. He is the author of the play, but not of a scenario founded on the play. That paragraph called for the name of the author in connection with the play to be produced pursuant to the various provisions of the agreement.

(10) By the *tenth paragraph*, the petitioner agrees not to exercise his right to print or publish the play until six months after the play is produced in New York City (Rec. p. 109).

We refer to this paragraph more at length in connection with respondent's contention that that paragraph is indicative of a limited reservation made by the author (see subd. E).

(11) The *eleventh and twelfth paragraphs* are restrictions on the respondent against leasing, subletting or assigning any of his rights, and provides that if the play should "fail in New York City and on the road", "it shall be released for stock", and the royalties received from such stock theatres divided between the parties.

Stock theatres are those presenting plays by living actors after they have been produced in New York and the metropolitan cities. They are played at a fixed royalty and limited to spoken plays, *not motion pictures*. The company remains at the theatre, producing a different play each week, as a rule (Rec. p. 72).

(12) The *addenda* to the contract provides for the successor in the role of "PEG" after Miss Taylor shall have finished her season; such successor to be mutually agreed upon (Rec. p. 110).

A motion picture film does not change stars. There is no such thing as a "successor" to a star in a motion picture film.

We have now considered every controlling paragraph of the contract, in an endeavor to ascertain what was in the minds of the parties on January 19, 1912.

Where is there a syllable in these "terms, conditions and limitations" of the license which, by the widest stretch of construction, can be held to be applicable to a photoplay?

May we not say with Judge Ward that there is not a word in the contract indicating an intention to transfer the movie rights, and that the words of the grant are to be restricted to what the parties were contracting about, viz., the spoken play? (Rec. p. 164).

C.

The modification of the contract, made July 20, 1914, somewhat reflects what was in the minds of the parties in January, 1912.

This modification (Plff.'s Ex. 9, Rec. p. 117) released Miss Taylor from appearing in the stellar role and accordingly respondent was relieved from the limitation of a production by one company only, with Miss Taylor in the part of "PEG". Respondent, however, agreed to use reasonable efforts to have Miss Taylor's name announced as the creator of the role (Rec. p. 118).

Here, again, we have a reference to companies producing the play in spoken drama only, and when the parties intended to refer to cinematograph or

motion pictures, they knew the distinction and used those terms (see par. ninth, Rec. p. 120).

The ninth paragraph of this modifying agreement prohibited, *for a term of four years from July 20, 1914*, the use of the play for motion picture purposes by either party without the consent of the other. If respondent possessed, or believed he possessed, exclusive motion picture rights, there would have been no occasion for inserting that provision, because *he* certainly would not have licensed a photo production to the serious financial detriment of his stage performances (Rec. p. 73) and in that event, the petitioner could not authorize such photoplay; but, as the moving picture rights rested in petitioner, and as controversies had arisen between the parties (see recital top of p. 117), respondent was fearful that in a spiteful or vindictive spirit, petitioner would use or license others to exercise his motion picture rights before the expiration of the license, which petitioner claimed would be at the termination of the theatrical season of 1917-1918. It is, therefore, manifest why respondent exacted that provision.

While it is true we are considering what was in the minds of the parties in January, 1912, when the original contract was made, still we may consider the terms of the modifying agreement of 1914 as reflecting light on the anterior contract, unless we are estopped by the provision that paragraph ninth is not to be construed as a recognition by either party that the other had, under the original agreement, or acquired under the modifying agreement, the right to give motion picture performances (Rec. p. 121).

This ninth provision of the modifying agreement also provides that after the expiration of the said

four years' period, the rights, whatever they may be, of either party, in respect of motion pictures, shall be such as they are legally entitled to under and pursuant to the original agreement, as though the supplemental agreement had not been entered into, without any admission or recognition by either that the other has or had motion picture rights. As recited in the agreement, controversies had arisen between the parties. Petitioner claimed that paragraph third of the license of 1912 was a limitation of its duration, and that the five years' period ended with the close of the theatrical season of 1917-1918.

This claim was disputed by respondent, who urged that under any construction, his license would not expire until the end of the season of 1918-1919, that is to say, April 30, 1919 (see Rec. p. 58).

Both sides conceded, when the modifying agreement was entered into, that the license had *at least* four years to run, that is to say, until the end of the theatrical season of 1917-1918. We, therefore, have the four years expressly covered, with respondent free to claim, as he does now, that his license extends beyond April 30, 1918, without, however, either side being prejudiced by paragraph ninth.

We refer to it only to show that when the parties intended to speak of motion pictures or a cinema performance, they used those terms, as distinct from a production of the "play". Throughout the license of January, 1912, there is reference only to the "play", and its production, under terms and conditions which irresistibly point to a performance by means of living actors.

D.

The word "represent" used in the contract, cannot be construed as referring to a motion picture, as distinct from the play.

The license granted the right to "produce, perform and represent" the play (Rec. p. 107). Circuit Judge Manton says that "ordinarily one may 'produce or perform' a spoken play upon the stage, but 'to represent' seems to be peculiarly appropriate to a motion picture representation of a play" (Rec. p. 161).

Prior to 1856, the author of a dramatic composition had, under the Copyright Laws, only the exclusive right to print, reprint, publish and vend his work. In 1856, he was granted the additional right to "act, perform or *represent* the same or cause it to be acted, performed or *represented* on any stage or public place during the whole term for which the copyright is obtained" (11 U. S. Stat. at Large, p. 138). Motion pictures were unknown at that time.

This amendment (1856) was modeled upon, but not entirely copied from, the British Dramatic Literary Property Act of 1833 (3 and 4 Will, IV c. 15, commonly called Sir Bulwer Lytton's Act).

The English Act uses the language "*sole liberty of representing or causing to be represented*", without using the words "perform" or "produce", and was passed at a time when the word "represent" could only be used and understood to apply to the spoken drama.

Copyright secured in England under the Imperial Copyright Act of 1842 (5 & 6 Vict. ch. 45) extended to every part of Her Majesty's dominions, including Canada.

Routledge vs. Low, L. R. 3; H. L. 100;

Black vs. Imperial Book Co., 8 Ont. Law Rep. 9.

Smiles vs. Bedford, 1 Ont. Ap. Rep. 436.

The word "represent" is used in connection with a performance of a play in spoken drama not only by Congress, and the English Parliament, but in like connection by the English courts.

Murray v. Elliston, 5 Barnewall & Alderson Rep. 657.

Duck v. Bates, 13 L. R. Q. B. 843 (1883-1884).

Chappel v. Boosey, 21 L. R. Ch. Div. 232 (1882).

E.

The provision found in paragraph Tenth of the license that the author would not exercise his right to print the *play* until six months after its production in New York City, is not a limitation of the reserved rights possessed by the author.

Circuit Judge Manton held that an expression in a contract of one or more things of a class implies the exclusion of all not expressed, although all would have been implied had none been expressed (Citing 13 Corpus Juris, 537) (Rec. p. 162).

To be logical, opposing counsel must argue that the respondent is also possessed of the right to translate the play or to novelize it, and exercise *all other rights* vested in the owner of a copyright of a dramatic composition, or of a manuscript play, excepting to print and publish it *as a play*.

As matter of fact, the play was novelized and printed in story form by the author as early as 1913, without any question or objection by respondent; but all proof on that subject was excluded on objection by respondent (Rec. pp. 50, 51; Plff.'s Ex. 5 for Identification, Rec. p. 103; Plff.'s Ex. 6 for Identification, Rec. p. 104).

The purpose of paragraph tenth is quite mani-

fest. It was to *delay* the exercise by the author of his undoubted right to publish the play until six months after the stage representation in New York City, not otherwise to limit or grant to respondent his reserved rights.

F.

The fact that petitioner retained the motion picture rights is not inconsistent with a license limited to a representation of the play as a spoken drama.

The learned Circuit Judge writing the prevailing opinion below said that the court should be reluctant to give a construction not warranted by the language, nor intended by the parties, which would permit of competition by the petitioner in the production of the play in motion pictures (Rec. p. 162).

The fact that an author might destroy the value of his play as a spoken drama, by giving motion picture performances thereof, is only to argue that the author had the power to do the idiotic act of annihilating his play, of which he was so proud that he provided against an alteration, elimination or addition of a word without his consent. *He might also have published his play without copyright protection six months after its first representation in New York City, and thus have made it common property.* With the loss of his common law rights would have fallen the movie rights, claimed by respondent.

Société Des Films Menchen v. Vitagraph Co. of America, 251 Fed. 258.

There is nothing in the agreement that required him to copyright the play when published. Yet common sense dictates that the petitioner would no

more destroy his literary product by publishing it without copyright protection than he would commit the equally senseless act of authorizing a motion picture performance (except vindictively), while it was being produced in spoken drama, upon the success of which his royalty depended.

May we not in turn argue that if the respondent's contention is tenable that he acquired the motion picture rights, he would have had the right to produce the play in that form *the day after the contract was signed*? If he possessed the motion picture rights, what was there to prevent his producing the play in that form, and *not at all as a spoken drama*?

Was that the intention of the parties?

By the amendment to Section 5 of the Copyright Act (approved August 24, 1912, 37 Stat. 488), motion picture photoplays are classified apart from dramatic or musical compositions (subdivisions *l* and *m*). *These rights are separable*; "there might be a copyright for a dramatization of the old sort (acted on a stage) and also a copyright for a dramatization of the new sort (arranged in motion pictures)."

Photo-Drama Motion Picture Co. vs. Social Uplift Corporation, 220 Fed. Rep. 448-449.

If respondent's contention has weight he may secure a separate copyright of the motion picture representation, distinct from the copyright of the petitioner, and this under a contract by which he undertook to perform the play, just as it was written by the author, without making any alteration, elimination or addition, and under a license which specified in detail, and with some elaboration, the

limitations and restrictions under which the performance is licensed.

The effect of the decree is that under a license "to produce, perform and represent" the play for seventy-five times each *theatrical season* for five years, the defendant has been awarded the right in perpetuity to produce the play in motion pictures, irrespective of the various provisions of the contract, to which reference has been made, and with no other obligation than to give, or authorize the giving, of said number of performances each *theatrical season*, whether produced as a motion picture or as a spoken drama.

Authorities.

G.

The case of *Kalem Co. v. Harper*, 222 U. S. 55, has been, we respectfully submit, misapplied.

The learned District Judge, in his opinion, declared that the word "produce" found in the contract under discussion, when used alone, has a definite meaning by virtue of *Kalem Co. v. Harper*, 222 U. S. 55. "In other words", he says, "'produce' includes the presentation in or by way of motion pictures. The scope of the word, as thus judicially defined, can be narrowed only by some other language, employed by contracting parties to express a different intent" (Rec. p. 156).

The learned court further said that "the suggestion that paragraph 'Seventh' [prohibiting alterations, eliminations or additions] has any bearing upon the question of motion picture rights, is not persuasive, in view of the *Kalem* and *Frohman vs. Fitch* cases" (Rec. p. 158).

The prevailing opinion of the Circuit Court of Appeals does not follow the reasoning of the Dis-

strict Judge. ~~As~~ we have seen the appellate court held that the word "represent" not "produce" covers photo-play rights.

The *Kalem* case did not affect or concern a contract, nor did this Court therein "judicially define" the word "perform" or hold that it included motion pictures, when used in a contract.

The Kalem Company—a naked infringer—sought to give a motion picture performance of "BEN HUR", which had been duly copyrighted as a novel, as well as the dramatization based thereon. The infringer defended its act by urging (a) that a motion picture performance was but a *series of pictures* of the incidents described in the book, and that neither the copyright of the novel nor the play included *photographs* of scenes or incidents found in the story; and (b) that the exhibition of the picture arranged upon a film which was, during all the time of its use, a part of a machine, was no infringement of the book copyright, nor a public performance or representation violative of the Dramatic Copyright Act.

This court held that the pantomimic performance of "BEN HUR" was a dramatization of the copyrighted work and violative of the author's exclusive right of dramatization.

There was no question presented of the construction of a contract, nor was there a judicial definition of the word "perform" or an adjudication that such word, when found in a contract, could only be narrowed by other language employed by the contracting parties to express a different intent.

The meaning of the word "produce" is not even referred to in the *Kalem* case.

The Circuit Court of Appeals, in the prevailing opinion, refers to the *Kalem* case as having been its authority in a previous case (*Klein v. Beach*,

239 Fed. Rep. 108) for holding "that the dramatic rights included motion picture rights, but such a conveyance of dramatic rights to have such meaning, cannot be narrowed by other limitations" (Rec. p. 162).

In *Klein v. Beach*, 239 Fed. Rep. 108, the exclusive right to dramatize a book for presentation "on the stage" was held to *exclude* the presentation by means of motion pictures (see contract set forth at length in 232 Fed. 242).

The only distinction between that contract and the one under discussion is in the use of the words "presentation on the stage". Every paragraph of the contract at bar bears the imprint of the words "presentation on the stage".

Respondent's license covers the acting rights of the play, as written by the author—that is, for English performances.

In England, a contract covering the "acting rights" is held *not* to include cinema rights, nor do the words "English performances", embrace them.

Ganthony v. G. R. J. Syndicate, Ltd.

Wyndham v. A. E. Huebsch & Co., Ltd.

("The Author", Vol. XXVI, No. 1, of Oct. 1, 1915, pages 16 and 17).

Cases relied upon by respondent in the Court below.

Frohman vs. Fitch, 164 A. D. (N. Y.) 231.

In that case, the late Charles Frohman employed one Clyde Fitch, in February, 1900, to write a play, to be delivered before January 1, 1901, under an agreement by which Fitch sold, assigned and transferred to Frohman the exclusive rights to produce the play in the United States and Canada, upon certain specified terms. The play was written, de-

livered and performed, and *fourteen years thereafter*—in 1914—after the death of Fitch, the licensee of the Fitch estate announced its intention of giving motion picture performances of the play. This threatened act was enjoined as a violation of the rights acquired by Frohman.

In *Lipzin v. Gordin*, 166 N. Y. Supp. 792, the contract contained no provision inconsistent with the grant of the right to produce the play in moving pictures.

In *Hart v. Fox*, 166 N. Y. Supp. 793, the plaintiffs were the *owners of the play* acquired from the executors of one McDowell, and licensed defendant to present the play in moving pictures for a fixed sum, which it was alleged had never been paid. The contest turned upon the sufficiency of proof respecting plaintiffs' ownership of the play.

Photo Drama Motion Picture Co., Inc., v. Social Uplift Film Corporation, 220 Fed. Rep., 448; *Klaw vs. General Film Co.*, 154 N. Y. Supp. 988, and *Universal Film Mfg. Co. vs. Copperman*, 212 Fed. Rep. 301, and *Liebler & Co. v. Bobbs-Merrill Co.*, 162 A. D. 900, have not the slightest bearing upon the question under discussion.

II.

The license was not the grant of a right in perpetuity, as was held by the Court below.

This question only becomes important in the event of the court not agreeing with our contention elaborated in the preceding point.

When the contract was made in 1912, *the play was still in manuscript*, and the parties were deal-

ing with respect to an uncopyrighted play. The contention of respondent is that this license is one *in perpetuity*, so long as he shall give seventy-five performances during each theatrical year.

The petitioner's contention is that the term of the license was for a period of five years (par. 3), meaning five *theatrical* years or seasons.

Grant v. Maddox, 15 Meeson & Welsby's Rep. 737.

The respondent urges that after he has complied with paragraph "third", then his rights are unending, unless he shall give less than seventy-five performances during a theatrical year.

Paragraph "fifth" of the contract supplements paragraph "third". The license was subject to the "terms, conditions and limitations" specified in the contract. The limitation was five years (par. 3). The *condition* was that seventy-five performances should be given each season during those five years, and the penalty for a breach of this condition is found in paragraph "fifth", namely, that all rights shall revert to the author.

These two paragraphs "third" and "fifth" should be construed together, and might properly have been combined in one section. As so construed, the obligation of the respondent was to produce, for a period of five years, with a penalty of forfeiture in case he failed to give the stipulated number of performances each year during the term.

In the absence of the penalty clause, a failure to perform would only vest in petitioner a right of action at law for damages for the breach—an illusory remedy.

Broadway Photoplay Co., Inc., v. World Film Co., 225 N. Y. 104.

The obligation to give seventy-five performances each season is provided for in paragraph "Third", therefore paragraph "Fifth" serves no purpose, unless construed as providing the *penalty* for a failure to give the required number of performances specified in paragraph "Third" during any theatrical year *of the term of the license mentioned in paragraph "Third"*.

III.

The judgment should be reversed, with instructions to grant the relief prayed for in the complaint.

Respectfully submitted,

DAVID GERBER,
WILLIAM J. HUGHES,
Counsel for Petitioner.

APPENDIX.**Opinion of District Judge Mayer.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

<div style="border: 1px solid black; padding: 10px;"> <p>J. HARTLEY MANNERS, Plaintiff,</p> <p style="text-align: center;">AGAINST</p> <p>FAMOUS PLAYERS-LASKY COR- PORATION, Defendant.</p> </div>	}	In Equity.
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DAVID GERBER, of New York City, for plaintiff;
NATHAN BURKAN and ELEK J. LUDVIGH, both
of New York City, for defendant.

MAYER, *District Judge*:—

This is a suit to restrain the production and release of the motion picture "Peg O' My Heart" and the making of additions thereto and alterations thereof.

On January 19, 1912, plaintiff entered into a contract with one Morosco which was modified in certain particulars by a supplemental agreement dated July 20, 1914.

A litigation arose between the parties as to whether Morosco had acquired the motion picture rights and, in a suit brought by plaintiff against Morosco, the court dismissed plaintiff's bill, holding that Manners had conveyed these rights to

Morosco. The details of this controversy will be found in *Manners v. Morosco*, 254 Fed. Rep. 737; affirmed 258 Fed. Rep. 557.

Thereafter, the Supreme Court allowed a writ of *certiorari* and the cause is now on the calendar of the Supreme Court awaiting a hearing, a motion to advance having been opposed by Morosco and having been denied by the Supreme Court.

Under paragraph "Eleventh" of the supplemental agreement, *supra*, it was provided:

"ELEVENTH.—Said Morosco is hereby expressly authorized to lease, sub-let, assign, transfer, or sell, to any person or persons, firm or corporation, whatsoever, any of his rights acquired under said Original Agreement or this Supplemental Agreement; it being expressly understood and agreed that no such leasing, sub-letting, assignment, transfer, or sale shall in any way release or discharge said Morosco from his personal liability to pay to said J. Hartley Manners the royalties in amounts, manner, and at the time, as specified in said Original Agreement and in this Supplemental Agreement."

On December 14, 1918 (a day after the decree dismissing the bill against Manners was filed) Morosco granted to this defendant "the exclusive right to reproduce" "Peg O' My Heart" "in the form of motion pictures or of a photo-play and to publicly represent and cause to be represented such reproduction in the United States and Canada."

In view of *Manners v. Morosco*, *supra*, defendant, so far as appears from this record, is entitled to reproduce the play in motion pictures.

The pendency of the *certiorari* proceedings between Manners and Morosco does not in any man-

ner act as a stay in this suit between Manners and this defendant. The suggestion that the court, as matter of respect and courtesy, should wait until the Supreme Court shall have decided *Manners v. Morosco*, is not pertinent.

The production of a motion picture by these defendants will not render moot the question pending in the Supreme Court; for if the Supreme Court should reverse, Manners will have his appropriate remedies against Morosco and could make this defendant (if the picture were produced) respond to an appropriate accounting.

There is thus left for determination the question arising out of "Paragraph Seventh" of the agreement between Manners and Morosco, which reads as follows:

"No alterations, eliminations or additions to be made in the play without the approval of the author."

This paragraph is not only a part of the original agreement but, under the terms of the supplemental agreement with other paragraphs it was "in all respects ratified, confirmed and approved." It cannot be held, therefore, that this paragraph Seventh refers only to the spoken play but, on the contrary, it applies as well to a motion picture reproduction of the spoken play.

At the outset it is necessary to determine the proper construction of this paragraph. It is obvious that a spoken play cannot be literally reproduced on the screen. The screen must convey by pantomimic action and legends or concise statements, whether by way of narrative or dialogue, the subject matter and action of the play. Therefore, an alteration, elimination or addition which is faithfully consistent with the plan and sequence

of the play, cannot be held to be an alteration, elimination or addition prohibited under the Seventh paragraph without the consent of the author. On the other hand, the author and playwright, by virtue of the contract expressed in the Seventh paragraph, is entitled to the exercise of the veto by that paragraph secured, in respect of any part of the motion picture which constitutes, within the intent of the parties, an alteration, elimination or addition.

To illustrate: The scene in Westminster Abbey described in Arnold Bennett's "Buried Alive", might very well be a part of a motion picture, although eliminated in the spoken play known as "The Great Adventure".

Klein v. Beach, 232 Fed. Rep. at page 246.

Any person seeing the picture would realize that such a portrayal of Westminster Abbey would probably not be practicable in the spoken play and yet the Westminster Abbey scene might very well be not construed as an addition or alteration because of the reference to it in the dialogue of the play.

In the case at bar the scene of the play is confined to the Chichester house at Scarborough, England. The plot and incidents of the play are so familiar to the litigants and counsel that, in the interest of brevity, it is unnecessary to set them forth in this opinion.

Early in the play the fact of the death of Kingsworth, the uncle of the heroine, is made known and the solicitor also describes the provisions of Kingsworth's will. In the motion picture an imaginary scene is displayed in which Kingsworth is making his will and in which Jerry (Sir Gerald Adair), the hero of the play, and the solicitor are present.

One of the valuable features of the play is the mystery surrounding Jerry's identity and the fact that he is one of the executors of the Kingsworth will. This feature of surprise is eliminated from the motion picture, whereas in the play it is well concealed and the fact that Jerry is an executor does not become known until almost the end of the play.

The question before the court is not whether this order or sequence in the motion picture is as good or better than the order or sequence of the play. The point is that it is such an alteration as under the Seventh paragraph could not be made without the consent of the author. In the motion picture there would be no doubt in the mind of the audience from the start as to who Jerry is and there is very little doubt, if any, as to what will happen. One of the most important factors in any play is the suspense. To attain this method and result successfully involves one of the problems of play writing and not infrequently a play fails because the audience learns too early what the end will be and what part or relation each actor bears to the ultimate climax or denouement. This element of surprise has been admirably done in the spoken play by plaintiff and no doubt was one of the reasons contributing to the remarkable success of the play. A different situation might have been presented if the play opened in the manner devised by the plaintiff and if, in the course of the dialogue between the solicitor and the Chichesters, the screen had interpolated a scene showing the making of the will but eliminating Adair therefrom to such extent at least as would not disclose his identity.

In the motion picture the so called English-Irish controversy is emphasized quite out of proportion

to the references in the spoken play. In the play, Peg's references to her father are incidental to a portrayal of her own character and her devotion to her father. The play has no political purpose or significance. In the last analysis, it is a charming, clean love story with a whimsical, wholesome young girl as the heroine and a manly, aristocratic young Englishman as the hero. Indeed, plaintiff opens his play book with the quotation:

"Oh there's nothing half so sweet in life
As Love's young dream."

One of the contrasts developed in the play is that of a young girl whose father was of Irish birth and whose mother was English and who had lived part of her life in America, suddenly coming to the surroundings of an English home. This contrast is the means of introducing some of the comedy of the play and, naturally, some of its dramatic interest. In the play the girl comes from America. In the motion picture she comes from Ireland. This departure is adopted probably in order to give opportunity for the picture to display various scenes in Ireland. Some of these scenes are very attractive, especially the peasant scenes and would, no doubt, be pleasing to the spectator but most of them are foreign to the theme of the play and are in no way needed to illustrate the action of the play. Certain pictures are introduced which do not appear in the play and delay the action of the story. One of these is the scene of Peg with her tutor and the unnecessary introduction of a scene from Antony and Cleopatra.

It is impracticable to analyze the motion picture scene by scene and compare it with the spoken play. The writer of the scenario evidently had in mind the kind of presentation which pleases the

audience of a motion picture play and, to that end, departed from the sequential expeditious course of the spoken play.

To illustrate that it is not necessary to follow the play literally, I may observe that I should not regard the ballroom scene in the picture as in violation of paragraph Seventh. This scene which forms a pleasant picture, does not detract from the theme nor continuity of the story and, if anything, might be regarded as a helpful illustration.

But the point is that, in view of the fact that the parties contracted as set forth in the Seventh paragraph, there cannot be a substantial deviation from the *locus* of the play or the order and sequences of the development of the plot. If these substantial features are retained, then such pictures as may be necessary to explain the action of the play and as may be necessary in substitution for dialogue, may be entirely proper and not in violation of the Seventh paragraph.

The case is probably *sui generis* for doubtless in most contracts the producer will insist upon a reasonably free hand if he intends to reproduce the play in motion pictures.

For the reason, therefore, that the provisions of paragraph Seventh have not been adhered to, plaintiff is entitled to a decree restraining the production of the motion picture in question.

December 11, 1919.

RESPONDENT'S

BRIEF

No. 370

Office Supreme Court, U. S.
FILED

FEB 26 1920

JAMES D. MAHER,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1919

J. HARTLEY MANNERS

Petitioner

against

OLIVER MOROSCO

Respondent

BRIEF ON BEHALF OF RESPONDENT

CHARLES H. TUTTLE
WILLIAM KLEIN

Counsel for Respondent



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SUPREME COURT OF THE UNITED STATES

J. HARTLEY MANNERS,
Petitioner,

v.

OLIVER MOROSCO,
Respondent.

No. 370.

BRIEF FOR RESPONDENT.

*On Writ of Certiorari to the United States Circuit
Court of Appeals for the Second Circuit.*

Statement.

The decree of the District Court, affirmed by the Circuit Court of Appeals, adjudged (p. 79).

- (1) That the bill be dismissed on the merits;
- (2) That the rights granted to the respondent (hereinafter called the defendant) under the contracts between the parties are not limited in duration to the period of years or seasons specified in paragraph Third of the contract of January 19, 1912; and
- (3) That these rights include the motion picture rights to the play entitled "Peg O' My Heart."

*Statement of Facts.***Nature of Action.**

The bill of complaint purports to set forth two causes of action:

First, for threatened infringement of the petitioner's copyright in this play, obtained in July, 1918. The bill charges that the defendant intends to give motion picture representations of the play (fols. 6-36).

Second, for a threatened, unauthorized use of the play both on the stage and in motion-picture form (fols. 36-93).

The relief demanded is that the defendant be restrained—

(1) From playing, producing, or controlling in any manner, "Peg O' My Heart;" and

(2) From manufacturing or presenting any motion picture based upon "Peg O' My Heart" (fols. 94-100).

Notwithstanding the extraordinary extent of the complaint and the array of subsidiary charges which it marshals, the petitioner's claims have, upon the trial and the brief, boiled down to the interpretation of the two contracts which it sets forth: one dated January 19, 1912 (fol. 38), and the other dated July 20, 1914, modifying the former (fol. 55).

The claims which the petitioner (hereinafter called the plaintiff) presses are, in substance, three:

1. The defendant's rights under these contracts terminate automatically, with the period of dram-

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atic seasons mentioned in paragraph Third of the earlier contract.

2. If this be so, this period terminates with the season of 1917-8, and not with the season of 1918-9 (fols. 163 *et seq.*).

3. The producing rights which the defendant has by virtue of these contracts, do not include production in motion picture form.

The defendant claims in accordance with the judgment of the courts below.

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The plaintiff is a playwright and the author of the play, "Peg O' My Heart." On January 19, 1912, he and the defendant entered into a contract whereby, for continuing considerations, he granted to the defendant, without any declared limitation of time (fol. 41).

"the sole and exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada."

This contract reads as follows (fol. 38-50):

"*Agreement* made and entered into this nineteenth day of January, one thousand nine hundred and twelve between J. Hartley Manners of the City, County and State of New York, party of the first part, and Oliver Morosco, of the Burbank Theatre, Los Angeles, California, party of the second part,

Witnesseth:

"Whereas the party of the first part is the

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sole and exclusive author and owner of a certain dramatic composition at present entitled 'Peg O' My Heart' and

"Whereas, the party of the second part wishes to obtain the exclusive right and license to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

"Now, therefore, in consideration of the premises and of the mutual covenants and promises of the parties of these presents hereinafter contained and in consideration of the sum of one dollar, lawful money of the United States, this day by each of the parties hereto to the other in hand paid, the receipt whereof is hereby reciprocally acknowledged, and for other good, valuable and adequate consideration it is hereby understood, covenanted and agreed by and among the parties to the agreement as follows:

"*First.*—The party of the first part hereby grants and by these presents hereby does grant to the party of the second part subject to the terms, conditions and limitations hereinafter expressed, the sole and exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

"*Second.*—The party of the second part in consideration of such grant hereby agrees to pay to the party of the first part the sum of five hundred (\$500.00) dollars upon the signing and execution of this agreement, the receipt whereof is hereby acknowledged, and which sum shall be in advance of the royalties to accrue to the party of the first part under this agreement, and it is not to be returned to the party of the second part under any circumstances whatsoever, but is to be credited as the payment of the first royalties

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as hereinafter provided, if the said play shall be produced by the said party of the second part under this agreement.

"Third.—The party of the second part agrees to produce the play not later than January first, 1913, and to continue the said play for at least seventy-five performances during the season of 1913-1914, and for each theatrical season thereafter for a period of five years.

"Fourth.—The party of the second part further agrees to pay to the party of the first part not later than the first Wednesday following each and every week during which a performance of the said play shall have been given further sums as royalties, as follows:

"Five per cent. (5%) of the first four thousand five hundred (\$4,500) dollars gross weekly receipts; seven and one-half (7½%) per cent. on the next two thousand (\$2,000) dollars gross weekly receipts; and ten (10%) per cent. on all sums over that amount of six thousand five hundred (\$6,500) dollars gross weekly receipts—which said sum of money, together with certified box-office statements, the party of the second part agrees to send to the party of the first part.

"Fifth.—The said party of the second part further agrees that if during any one theatrical year, such year to begin on the first day of October, said play has not been produced or presented for seventy-five performances, then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part.

"Sixth.—It is further agreed that the said party of the second part shall present the said

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play in first class theatres with a competent company, the said company to be mutually satisfactory to both the parties to this agreement, and with Miss Laurette Taylor in the title role of 'Peg O' My Heart' and that the play will have a production in New York City and will be continued on the road with Miss Taylor in the part of 'Peg' for at least one season or longer if considered advisable by both parties to this agreement.

"*Second.*—No alterations, eliminations or additions to be made in the play without the approval of the author.

"*Eighth.*—The rehearsals and production of the play to be under the direction of the author.

"*Ninth.*—The name of the author to appear on all advertising, reading and printed matter used in connection with the play.

"*Tenth.*—The author to have the right to print and publish the play, but this right is not to be exercised by the author within six months after the production of said play in New York City unless the written consent of the manager has first been obtained.

"*Eleventh.*—Said manager does hereby agree that he will not lease, sub-let, assign, transfer or sell to any person or persons, firm or corporation, any of his aforesaid rights in and to the said dramatic composition or play without the written consent of said author has first been obtained. Should the play fail in New York City and on the road it is agreed between both parties it shall be released for stock.

"*Twelfth.*—Whenever the play is released for stock the royalties received from the Stock

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Theatres to be divided equally between the party of the first part and the party of the second part.

"Thirteenth.—This agreement is binding upon the parties hereto, upon their heirs, executors assigns, administrators and successors.

"In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

"In the presence of:

"J. HARTLEY MANNERS (L. S.)

"OLIVER MOROSCO (L. S.)"

Following the signature of the parties, the contract bore the following addendum (fol. 51):

"It is further agreed that after Miss Taylor shall have finished her season in 'Peg O' My Heart' as provided for in this contract, her successor in the role of 'Peg' for any subsequent tour shall be mutually agreeable to both parties to this contract.

"J. HARTLEY MANNERS,
"OLIVER MOROSCO."

According to plaintiff's testimony, at the time of the execution of this contract the accepted theatrical season would begin about October 1st, and "would run into May" (fol. 181).

On July 20, 1914, the parties entered into a modifying agreement, whereby arrangement was made for productions without Laurette Taylor in the star part, and for the production of the play with more than one company; the defendant was permitted to lease, sub-let, assign, transfer or sell

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to anyone any of his rights under either contract; and provision was made for determining by reference to the former contract the issue between the parties as to the ownership of the motion-picture rights. This agreement reads as follows (fols. 55-70) :

"Whereas J. Hartley Manners, of the City, County and State of New York, party of the first part hereto, and Oliver Morosco, of Los Angeles, California, party of the second part hereto, have heretofore entered into an agreement, dated January 19, 1912, (hereinafter called 'Original Agreement') a copy of which is hereto attached and by the express reference thereto made a party hereof; and controversies have arisen and now exist between the parties hereto with reference to the meaning of said Original Agreement, and the parties hereto desire to settle and adjust said controversies, and to change said Original Agreement as hereinafter set forth;

"Now, therefore, in consideration of the premises, and good and valuable consideration moving from each of the parties hereto to the other, the receipt whereof by the parties hereto is hereby respectively acknowledged the parties hereto do hereby enter into this Supplemental Agreement:

"First.—The parties hereto do hereby settle and adjust all of said controversies.

"Second.—Said Original Agreement, except as by this Supplemental Agreement changed, is hereby in all respects ratified, confirmed and approved.

"Third.—Paragraph 'Sixth' and 'Eighth' of said Original Agreement, and also the addendum or postscript to said Original Agreement

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(which addendum or postscript bears the signature of said Manners and said Morosco) are each and all hereby cancelled and eliminated from said Original Agreement.

"Fourth.—There shall be and there is hereby added to said Original Agreement, the following, to be designated as new paragraph 'Sixth' thereof:

" 'Said Morosco may, contemporaneously, and from time to time, as long as this contract is in force, produce, perform and represent said play "Peg O' My Heart," with or in as many companies in the United States and Canada as he, the said Morosco may, in his sole discretion, deem proper, and it is further agreed that Laurette Taylor (Laurette Taylor Manners) need not be engaged to appear and need not appear in the title role or star or principal part, or any other part in any of said companies, and that the said Morosco need in no way consult or confer with the said J. Hartley Manners respecting the star, the cast, the featured member or members of the cast, the rehearsals, or production of said play by any of the said companies—of all of which the said Morosco shall have, and is hereby given, sole and exclusive charge and control.'

"Fifth.—There shall, and there is hereby, added to said Original Agreement, to be known as new paragraph 'Sixth-a' the following:

" 'Said Morosco shall use reasonable efforts to direct that all advertising matter in the United States and Canada shall contain a reference to the fact that said Laurette Taylor was the creator of the role of "Peg" in said play; it being the intention of this provision that said Morosco shall use reasonable en-

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deavors to have said Laurette Taylor's name featured in the manner above indicated, but it being expressly understood and agreed that said Morosco shall have the unlimited right and privilege to feature star, and advertise any other person or persons appearing or to appear in any of said companies, in any manner that he, said Morosco, shall deem fit or proper.'

"Sixth.—There shall be, and there is hereby added to paragraph 'Fourth' of said Original Agreement, the following provision:

'The royalties herein specified shall be paid to the said Manners by said Morosco at the rate herein set forth, for every company performing the said play of "Peg O' My Heart" in the United States or Canada, under the management of said Morosco, under said Original Agreement or this Supplemental Agreement.'

"Seventh.—It is further agreed that paragraph 'Eleventh' of said Original Agreement shall be, and the same is hereby, amended so as to read as follows:

"'Eleventh.—Said Morosco is hereby expressly authorized to lease, sub-let, assign, transfer, or sell, to any person or persons, firm or corporation, whatsoever, any of his rights acquired under said Original Agreement or this Supplemental Agreement; it being expressly understood and agreed that no such leasing, sub-letting, assignment, transfer or sale shall in any way release or discharge said Morosco from his personal liability to pay to said J. Hartley Manners the royalties in amounts, manner, and at the time as specified in said Original Agreement and in this Supplemental Agreement.'

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"Eighth.—It is further agreed that paragraph 'Twelfth' of said Original Agreement shall be and the same is hereby amended, so as to read as follows:

" 'Twelfth.—Said play "Peg O' My Heart" may be released for stock in the United States and Canada, during the time that this contract is in force, whenever the net amount realized from all the companies producing the play in any one theatrical season shall yield a net profit of less than two thousand (\$2,000) dollars. Whenever the said play is released for stock company or companies, the royalties received from the stock theatres shall be divided equally between the said J. Hartley Manners and said Morosco as and when received by said Morosco.'

"Ninth.—It is further agreed that during the period of four years from and after the date hereof neither party hereto shall or will, without the written consent of the other party hereto first had and obtained, directly or indirectly, produce, represent, or exhibit, or permit, allow or suffer to be produced, represented, or exhibited, or sell, lease, give or transfer, any permission privilege or right to produce, represent or exhibit, the said play by cinematograph or motion or moving pictures in the United States or Canada. It is further expressly understood and agreed that after the expiration of said four-year period, the rights whatever they may be of either said Morosco or said J. Hartley Manners, to directly or indirectly produce, represent or exhibit, or permit, allow or suffer to be produced, represented or exhibited, or sell, lease, give or transfer, any permission privilege or right to produce represent or exhibit the said play by cinematograph or motion or moving

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pictures in the United States or Canada shall be such as said Morosco and said J. Hartley Manners shall respectively be legally entitled to under and pursuant to the terms of said Original Agreement to the same extent and with the same effect as though this Supplemental Agreement had not been entered into. This provision is not to be construed as a recognition by either party hereto that the other had under the Original Agreement, or has, under this agreement, the right to give or authorize the giving of cinematograph or motion or moving pictures of said play.

"Tenth.—The said J. Hartley Manners and the said Morosco hereby forever mutually release the one the other from any and all claims and demands which either one now has or asserts, or might have or assert, against the other, for or on account of any alleged violation of said Original Agreement on the part of either of the parties hereto, prior to the execution of this Supplemental Agreement; provided, however, that said Morosco shall and will pay to said J. Hartley Manners, on or before July 31st, 1914, any and all unpaid royalties which said J. Hartley Manners shall be entitled to receive from said Morosco under said Original Agreement and this Supplemental Agreement.

"In witness whereof, the parties hereto have hereunto set their hands and seals, in original duplicate, at the City of New York, this 20th day of July, 1914.

"J. HARTLEY MANNERS (Seal).
"OLIVER MOROSCO (Seal)."

After the execution of this agreement the defendant organized a number of different com-

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panies, and gave performances of the play in various portions of the United States and Canada. From all these productions the plaintiff received the large stipulated royalties upon the gross weekly receipt, which necessarily amounted to a very large sum of money, since the net profits of the play in no one theatrical season have been less than \$2,000 (fol. 126).

When the season of 1917-1918 expired, the plaintiff claimed that the defendant no longer had any interest in any of the producing rights, and brought the present action to restrain his further production of the play, both on the stage and in motion-picture form.

FIRST POINT.

The judges below were right in their unanimous holding that the agreement of Jan. 19, 1912, as modified by the agreement of July 20, 1914, did not terminate by self-limitation at the end of the six theatrical seasons referred to in paragraph third of the former agreement.

The contrary contention although prominently featured by the plaintiff in the courts below is but faintly argued here and is relegated to a page and a half, at the back of the brief (p. 24). Logically however, it should be argued first, because if all rights under the contracts have expired, disputation as to what they included is idle.

On this issue little can profitably be added to

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what has unanimously been said in the opinions below (fols. 462-5, pp. 160-1).

A.

The contract as modified was not an agreement for personal services or for a naked license, but was a contract of bargain and sale, whereby property was granted and conveyed.

One who sells for a price all the production rights in a play does more than give a license or a personal privilege. He conveys property which, though intangible, is none the less of value and the subject of proprietorship, for what is there in a play outside of the two rights to publish and produce it? As said in *Frohman v. Fitch*, 164 App. Div. (N. Y.), 231, 233:

"The contract as we have seen, gave to the plaintiff the 'exclusive right to produce or to have produced the said play in the United States of America and in Canada.' This exclusive right was to protect the plaintiff *in the property* which he had purchased. *That the plaintiff's rights under the contract constituted property cannot be questioned.*"

Indeed, the fallacy of the opposite view was well and successfully answered by the plaintiff's own learned counsel, when in *Frohman v. Fitch* (*supra*), arguing for the very point which in this case the courts below have sustained, he wrote (see Mr. Gerber's reply brief in the *Frohman case*, page 1):

"The defendant's entire argument rests upon the mistaken theory that it [the granted right of production] was simply a license to produce the play, which Frohman secured, and

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not a sale or assignment of the exclusive right to produce."

It goes without saying that where property is conveyed, the conveyance is presumed to be absolute and not revocable at will or for a temporary period, in the absence of clear words of limitation (*Western Union Telegraph Co. v. Pennsylvania Co.*, 129 Fed., C. C. A., 849, 867, 862).

B.

Paragraph Third of the original contract (fol. 43) was not a grant by the plaintiff, but a covenant by the defendant. It was a statement of the least that the defendant was to do, not of the most that he was to have.

If the contract had left the defendant entirely free to determine whether and to what extent the play should be produced, it would by the same token have left the plaintiff without the assurance of a *bona fide* and sustained attempt on the part of the defendant to make the play successful, and hence would have deprived the plaintiff of any security for the very substantial stipulated royalties.

Consequently, the agreement provided in paragraph Third that the defendant should be bound to produce the play for at least seventy-five performances in a season for a certain number of theatrical seasons.

It does not follow that because the defendant undertook to give at least seventy-five performances in each season for a certain number of seasons that thereafter he would have no right to give any performance in any season.

Paragraph Third fixes a minimum, not a maximum.

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It was not a limitation in point of time upon the duration of the property rights conveyed by paragraph First. Both paragraphs are entirely consistent; and the fact that the defendant was to receive an absolute transfer of the production rights, subject to the condition subsequent expressed in paragraph Fifth, was in no way incompatible with an undertaking on his part that for a specified period he would guarantee to exercise those rights to a specified extent.

C.

The limitation of time expressed in paragraph Fifth excluded the implication of any other limitation of time.

The original agreement *does* undertake to provide a limitation of time, *and only one*—but one not measured by any fixed period of years. This limitation is found in paragraph Fifth, which reads (fol. 45):

“The said party of the second part further agrees that if during any one theatrical year, such year to begin on the first day of October said play has not been produced or presented for seventy-five performances, then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part.”

It is not claimed that the defendant has not presented seventy-five performances of the play in each theatrical season. Indeed, the very contrary is asserted (fols. 71-5).

The plaintiff, therefore, is unhorsed by the maxim *expressio unius est exclusio alterius*. (*Norfolk & N. B. Hosiery Co. v. Arnold*, 64 N. J. L., 254,

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258.) Having given a grant which was to continue as long as the defendant gave seventy-five productions a year (except that, in the event of unprofitableness, the play could be produced in stock, fol. 49), he cannot now substitute a fixed limitation of specified years. (*Hart v. Cort*, 83 Misc., N. Y. App. Term, 44, 46.)

As held by the General Term of the Common Pleas in *Cree v. Bristol*, 12 Misc., 1:

"An express provision in a contract for forfeiture of rights under it precludes an implication of other cause of forfeiture."

D.

The plaintiff's claim that under our construction paragraph Fifth of the original contract has no meaning or usefulness, is mistaken.

Paragraph Third constitutes an affirmative obligation on the part of the defendant to produce for at least seventy-five performances during each of the six theatrical seasons therein mentioned (fol. 43). If this affirmative obligation were broken, its breach would give the plaintiff a cause of action at law for damages and a defense to any action which the defendant might undertake against him for dereliction on his part. On the other hand, paragraph Fifth expresses, not an affirmative obligation on the part of the defendant, but a right of reversion on the part of the plaintiff.

These two paragraphs give to the plaintiff a double measure of remedies during the period of six seasons mentioned in paragraph Third; and thereafter, when the defendant's affirmative obligation under paragraph Third has expired, para-

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graph Fifth still preserves to the plaintiff a right of recapture in case the defendant shall fail to exploit the possibilities of success for their joint benefit. It is altogether evident that the defendant was unwilling to undertake an affirmative and positive obligation to produce at least seventy-five performances a season after the expiration of the six seasons mentioned in paragraph Third, but was willing, if he failed to do so, to allow the plaintiff to retake the rights granted.

In reality it is the plaintiff's construction which leads to a superfluity and redundancy of provision, for if it be true that paragraph Fifth is merely the "penalty" or "remedy" for a breach of paragraph Third, then why were these two matters placed in separate and separated paragraphs, and why did the parties not simply say that if the defendant should fail to comply with paragraph Third, his interest in the production rights should terminate.

Were not these two separate and separated paragraphs used because the parties foresaw that the success of the play might outrun the period which the defendant was willing to guarantee, and yet they desired to continue for such additional period of success exploitation by the defendant for their joint benefit, and because they perceived that by continuing the remedy of forfeiture they would place the defendant under a continuing inducement while relieving him of the guarantee, and at the same time preserve the plaintiff's rights if the inducement proved insufficient?

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E.

The provision for releasing the play for "stock," shows the continuous character of the grant.

The entire harmony of paragraphs First and Third and the purpose of the parties that the defendant's rights should not be limited to any definite period, are further emphasized by the provisions of paragraph Eleventh that should the play fail in New York City and on the road, it might thereupon be "released for stock" (fol. 49), *i. e.*, its production rights let out to stock companies, with an equal division of the royalties between plaintiff and defendant (Par. Twelfth, fol. 49). As the court knows, and as the evidence makes plain, stock theatres are not "first class theatres," and thus are not among the class of theatres wherein, by paragraph Sixth, the defendant agreed to produce the play as long as its success continued (fols. 214-7). Paragraph Eleventh, therefore which is unlimited in duration, is proof that the parties contemplated production by the defendant after the period mentioned in paragraph Third.

F.

Furthermore, the contract of modification constituted a plain recognition by both parties that the original contract was not limited to the period mentioned in paragraph Third, and that the only question which was to be considered open after July 20, 1918, was whether that contract carried the motion picture rights.

Paragraph "Ninth" (fol. 66) of the modified agreement leaves no shelter for a doubt that the parties viewed the production rights as continuous

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and that after the expiration of the four years referred to in that paragraph, the only open question would be as to whether the production rights continued to include the motion picture rights.

According to paragraph "Ninth" during the period of four years expiring July 20, 1918, the original contract was still in force as a conveyance of all the production rights, but neither party during that period could produce the play in motion picture form without the consent of the other; and after the expiration of four years the question of title—not to the production rights as a whole—but to the motion picture rights should be determined "under and pursuant to the terms of said original agreement."

We ask our learned adversaries, therefore, how is it that if, as they claim, by virtue of the original contract, *all* the production rights of the defendant were to cease on or before July 20, 1918, the supplemental contract provided for a method of determining the ownership of the motion picture rights for the future after that date?

Why was there no question as to the status thereafter of the production rights except in the single matter of motion picture rights?

Why make the elaborate provisions for a settlement of the future ownership of the motion picture rights, if the original contract (through which alone the defendant could own any producing rights at all) did not continue?

Plainly the parties contemplated that after July, 1918, this original contract would still continue to be a source of producing rights and the arbiter of

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the issue as to whether a specified class of producing rights was included therein. It would be absurd to suppose that either party would leave his future rights "under" a contract to be determined by a contract believed to expire before the period when the rights were to exist. It is nonsense to speak of being "legally entitled" to rights "pursuant to the terms of" a non-existing contract.

If the plaintiff had at that time even dreamed that the original contract would terminate at a definite time by self-limitation, then, in the making of these many amendments, was the time for him to speak, lest third parties should be misled and lest such a broad conveyance of proprietary rights and such unlimited arrangements for future production as is contained in the modified contract should be misconstrued.

G.

The modified contract also shows that the defendant received not a mere personal privilege, but property rights which the parties did not intend should expire by self-limitation at the end of the period referred to in paragraph Third of the original contract.

Even in the original agreement provision was made for a transfer and devolution of the defendant's rights. Thus, paragraph Thirteenth of the original agreement provided that, "This agreement is binding upon the parties thereto, upon their heirs, executors, assigns, administrators and successors" (fol. 50); and paragraph Eleventh expressly permitted the play "to be released for stock,"—a step which, necessarily, consisted of an assignment of the production rights to stock managers for production by stock companies.

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The modified contract, in its turn, wiped out the last restriction upon the usual rights of proprietors, for it expressly allowed the defendant to sub-let, assign or convey any part of his rights (fol. 63); expressly expunged the limitation of production on the stage to a company in which Laurette Taylor had the title role; and expressly eliminated the restriction on stage production to a single company (fols. 58-62).

Thus, the modified contract constitutes an out-and-out unrestricted sale of the production rights, except as they might be forfeited through non-user by the defendant.

The mere provision that an agreement for production rights should be binding upon the parties' heirs, executors, etc., led Judge Hand in *Photo-Drama Motion Picture Co. v. U. Film Corp.* (213 Fed., 374, affirmed 220 Fed., 448) to hold that a conveyance of motion picture rights was "an assignment" and not a mere "license."

H.

Any construction of the contract as modified, whereby it would be limited to the period of seasons mentioned in paragraph Third of the original agreement, would be harsh and oppressive of the defendant.

Even without such construction the contract bore heavily upon the defendant. At the time it was made, the play was a mere speculation. It had not been subjected to the acid test of public representation. The bargain which the plaintiff drove not only threw upon the defendant the entire cost of producing the play and placing it before the public, but also the entire burden of such losses as might occur; while at the same time it

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compelled the defendant to pay heavy royalties—not out of the net profits—but out of the gross weekly receipts, according to a sliding scale ranging from five to ten per cent. In short, even though the defendant made nothing or even lost money, the plaintiff was guaranteed a substantial fraction of every dollar received at the box-office.

The plaintiff now has the hardihood to claim that, in addition, the contract gave him the right to deprive the defendant of both the play and the rewards of hard-won success while such success was its very zenith, and to take over and exploit for himself alone the entire investment which the defendant had made of his time, money and professional reputation.

So harsh an interpretation must be rejected in favor of one which, recognizing the joint interest which both parties had in a continuous, successful management by the defendant, perceives that the parties intended to prolong such management until time made further production unprofitable, and then to continue the play, not by reversion to the plaintiff, but by lease to managers of stock companies for the joint benefit of the plaintiff and the defendant (fols. 49, 212-6).

I.

Quite apart from the special features and circumstances already discussed, the absolute character of this grant as not limited to any fixed period of years would follow as a matter of law.

As said in 6 *Ruling Case Law*, Section 281:

“Apart from contracts which, from their inherent nature, imply a power of revocation, it would seem that the intention of

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parties to an agreement, that it should be perpetual and without limit as to duration, could not be more properly expressed than by silence as to any time limit, or power of revocation. Although there appears to be some authority to the contrary, the rule seems to be that where no limitation is expressed in the agreement, neither party can terminate it without the consent of the other, unless the nature of the contract itself indicates with sufficient clearness that the parties must have intended some other determination."

In *Western Union Telegraph Co. v. Pennsylvania Co.*, 129 Fed., C. C. A., 849, it was held (p. 861):

"If a contract is not revocable at the will of either party, or otherwise limited as to its duration, by its express terms, or by the inherent nature of the contract itself, with reference to its subject-matter or its parties, it is presumably intended to be permanent and perpetual in the obligation it imposes."

In *McKell v. Chesapeake & O. Ry. Co.*, 175 Fed., C. C. A., 321, it was held (p. 329):

"No limitation is expressed in the agreement. And in such case the rule seems to be that neither party can terminate it without the consent of the other, unless the nature of the contract itself indicates with sufficient clearness that the parties must have intended some other determination."

In this connection, there are also two other rules of construction which are pertinent and helpful. The first is that stated in *White v. Hoyt*, 73 N. Y., 505 (p. 511):

"If the words of the promise may have been

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used in an enlarged or restricted sense, they will, in the absence of circumstances calling for a different interpretation, be construed in the sense most beneficial to the promisee."

The second rule is that stated in *Duryea v. Mayor*, 62 N. Y., 592 (p. 597) :

"It is a general rule that exceptions and restrictions are to be construed strictly against the grantor and are not to be extended beyond the fair import of the language expressed, except by necessary implication."

J.

Even if the contract as modified is to be limited to the period of seasons mentioned in paragraph Third of the original contract, the action must fail because premature. That period does not expire until the season of 1918-1919.

In his complaint and on the trial, the plaintiff claimed that the period mentioned in paragraph Third expired with the season of 1917-1918 (fols. 73, 163).

Not merely by juxtaposition, but by their very sense, the words "for a period of five years" relate and give definitional limitation to the words "for each theatrical season thereafter;" and the word "thereafter" necessarily means after the season of 1913-1914. In other words, the defendant was to give at least seventy-five performances in the season of 1913-1914 and at least seventy-five performances in each theatrical season thereafter for a period of five years.

SECOND POINT.

The contracts between the parties conferred upon the defendant as part of the production rights, the right to produce the play in motion picture form.

A.

The argument with which plaintiff's brief opens (p. 5), that the defendant's claim to the film rights is "belated," because he made no effort to use the motion picture rights prior to the 1918-19 season, is neither candid nor true.

The plaintiff's counsel must know that the modifying agreement of July 20, 1914, provided a truce of four years in the controversy which had *even then* arisen as to the motion picture rights, for it stipulated that until July 20, 1918, neither party should exercise those rights "without the written consent of the other" (fols. 66-8).

Hence, so far from the defendant's claim being "belated," it arose almost immediately; and the fact that not until after the season of 1917-18, did the defendant make any "effort to use the play for motion picture purposes," proves nothing but his scrupulous observance of the plighted truce,—a truce in the interest of both parties, because motion picture production speedily kills production upon the stage (fols. 217-220).

The plaintiff's brief constantly harps on the fact that during this period of truce the defendant sent out a large number of companies. Of course,—and if the defendant profited thereby, the plaintiff did so the more, because he got his large percentage not upon the net but upon the *gross* weekly receipts (fol. 44). The plaintiff admits receipt of at least \$214,000 in royalties (fol. 24),—and this

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without putting up a dollar or assuming any liability for losses!

B.

The granting clause of the contract of January 19, 1912, conveyed all the production rights.

The granting clause of the contract of January 19, 1912, reads as follows (fol. 141):

"First.—The party of the first part [the plaintiff] hereby grants and by these presents hereby does grant to the party of the second part, subject to the terms, conditions and limitations hereinafter expressed, the sole and exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada."

(1) This grant, it will be observed, was, as even Judge Ward conceded (p. 164), "large enough to cover" the production rights in picture form. It was absolute and all-inclusive, for two reasons: (a) It conveyed all the producing rights, without exception; and (b) the right conveyed was "exclusive" of all other producing rights. The rights conveyed could not be all the producing rights and be exclusive, and at the same time leave in the plaintiff the right to compete by producing the play in motion picture form. To quote the plaintiff's own testimony (fols. 217-220):

"Q. Does a motion picture performance compete with a performance of the same play in spoken drama? A. I consider it to be a great handicap.

"Q. What are the usual prices charged in motion picture theatres for admission? A. As low as five cents.

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"Q. And what effect has a motion picture performance of a play upon the production of the same play in spoken drama in the same city? A. It would be a most serious handicap to have the same play done in pictures at ten cents when you are presenting it at \$2.00 in the theatre."

The subsequent "terms, conditions and limitations" expressed no reservation or exclusion of the motion picture rights; and, both in consequence and inherently, these rights are a part of and incident to the entire body of production and representation rights which, with redundant exclusiveness and comprehensiveness, are conveyed by this grant from the plaintiff to the defendant. The motion picture rights can be deemed to be unaffected, only upon the assumption that to "produce" or "represent" the play in motion picture form is not to "produce" or "represent" the play—a contradiction in terms and a destruction of the plain meaning of language, which the courts have invariably refused to tolerate in innumerable identical cases.

Indeed, the learned attorney for the present plaintiff placed himself successfully on record in *Frohman v. Fitch*, 164 App. Div., 231, against the attempt to make any such distinction; and in his brief in that case argued as his first proposition (p. 5):

"A motion picture performance is a stage *representation* of the play, and violative of the rights of an owner of the *exclusive* right of production."

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In the course of his printed argument under this head, he said (p. 6) :

"The pantomimic performance before the camera is a carefully rehearsed production of the play, telling the same story in the same way as told by Mr. Frohman's company, with similar scenes, costumes and stage accessories. This pantomimic performance is reproduced in motion picture theatres, by means of a projecting machine, reproducing, upon the screen, the performance precisely as given before the high speed camera. The camera, the projecting machine and the screen are but accessories to the reproduction of the pantomimic performance given by the company, with scenery and costumes."

And again (p. 19) :

"If the author intended to except from this broad, absolute sale of the exclusive right of performance, the right to perform the play in motion picture theatres, it was necessary to expressly provide for such exception on reservation. If a representation, by means of motion pictures, is a production of the play, then it violates the exclusive 'right to produce' sold to plaintiff unless expressly reserved or excepted from the sale."

And the same learned attorney for the present plaintiff in *Kalem Co. v. Harper Bros.*, 222 U. S., 55, arguing that a motion picture of a play was a dramatic representation thereof, carried this Supreme Court of the United States with him when he said in his brief (p. 29) :

"Is that anything but a dramatization of a novel and a production thereof, by a company of actors, before the camera, followed

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by a stage representation? * * * It is a shallow fallacy to contend that defendant has simply taken photographs or pictures of the various characters and scenes of the books."

(2) The comprehensive force of the word "*exclusive*" when used in a conveyance of dramatic rights, and its clear purpose to prevent competitive production, has been well stated in *Photo-Drama Motion Picture Co. v. Social Uplift Film Corporation*, 213 Fed., 374, affirmed 220 Fed., C. C. A., 448. There, Judge Hand, in discussing the contract, said (p. 376):

"I cannot think that there is any doubt of the intention of this language to create an assignment of *all the dramatic rights which Kauffman had*. The test is whether anything remained in him. I can see nothing which could remain after the use of the words '*exclusive leasing*,' except the right personally to perform any drama which might be made from the book, or the right personally to present in moving pictures any scenario. *It would be absurd to suppose that Kauffman meant to retain the right to compete, certainly as regards moving pictures.*"

(3) The word "represent" is peculiarly appropriate to a motion picture representation of a play. As well said by Judge Manton (p. 161):

"Ordinarily one may 'produce or perform' a spoken play upon the stage, but 'to represent' seems to be peculiarly appropriate to a motion representation of a play."

Section 4952 of the Revised Statutes of the United States gave the author of a dramatic com-

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position not only the sole right of printing it but also the sole right

"of publicly performing or *representing* it or causing it to be performed or *represented* by others."

This section was originally enacted in 1891 before motion pictures were invented; and yet the Supreme Court of the United States in *Kalem Co. v. Harper Bros.*, 222 U. S., 55, held that a motion picture representation of "Ben Hur" was an infringement of the author's copyright, since it was a representation of the story dramatically.

In *Daly v. Palmer*, 6 Blatchf., 256, 6 Fed. Cas., page 1132, Case No. 3552, Judge Blatchford defined a pantomime as a "theatrical entertainment in which the whole action is *represented* by gesticulation, without the use of words," and speaking of "the railroad scene," said:

"Those parts of it *represented* by motion or gesture without language are quite as much a dramatic composition as those parts of it which are represented by voice."

(4) Furthermore, unquestionably the grant of an exclusive right to produce, perform and represent a play purports a grant of the exclusive dramatic rights, and the "dramatic rights include motion picture rights," unless that meaning is narrowed by the addition of other words. Before the present contract was made dramatic rights had acquired that definite and judicially determined meaning by virtue of *Kalem Co. v. Harper Bros.*, 222 U. S., 55, 61. If the parties to the present contract intended this form of grant to have any less

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meaning, language was available to reveal that intent.

It is inconceivable that if the parties had intended to reserve to the plaintiff the right to production in the then well-known motion picture form and thus to compete with the rights granted, no expression of that reservation would have been made, in the face of a grant in language comprehensive of all producing rights and judicially interpreted to include the picture rights.

The parties must be deemed to have acted with knowledge thereof and to have intended to deal according to the existing law and to grant the motion picture rights unless they were expressly reserved (23 *Cyc.*, 1101; *Slocovich v. O. M. I. Co.*, 108 N. Y., 56). Since the date of that decision, counsel for authors have fully understood the law and the practice has been, where reservation was intended, to express the intent. For example, in *Tully v. Triangle Film Corporation*, 229 Fed., 297, the contract for the play, "The Bird of Paradise," expressly reserved "the right to produce and present the same in motion picture photo-play form."

C.

In addition to the breadth of the granting clause itself, there are other provisions in the agreement which prove incontestably the mutual intent to convey the entire right to place the play before the American public in any form.

(1) Thus, the two recitals express this intent beyond the possibility of doubt (Complaint, fol. 42):

"Whereas the party of the first part is the sole and exclusive author and owner of a cer-

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tain dramatic composition at present entitled 'Peg o' My Heart,' and

"Whereas, the party of the second part wishes to obtain the exclusive *right* and license to produce, perform and represent the said play in the United States of America and in the Dominion of Canada."

These recitals make plain the purpose of the agreement to place the plaintiff in the position of author and the defendant of producer, and to give the latter the sole right exclusive of any competition by the author or his assigns, of placing the play before the American public in each and every form which constitute its production or representation. Whether it was so placed through the medium of living actors upon the stage or through the medium of pictures of such actors acting out the play upon the stage, in either case the play was being represented as well as produced and performed. As well said in *Kalem Company v. Harper Bros.*, 222 U. S., 55, in holding that a moving picture production of the story of Ben Hur was a dramatization of the work (p. 61):

"Drama may be achieved by action as well as by speech. Action can tell a story, display all the most vivid relations between men and depict every kind of human emotion without the aid of a word. * * * The essence of the matter in the case last supposed is not the mechanism employed but that we see the event or story lived."

D.

The expression of certain reservations in favor of the plaintiff was an exclusion of all others.

Whenever the parties desired to reserve to the

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author any of the rights of representation, they found no difficulty in expressing their intent, and consequently have themselves invoked the hoary rule of construction *expressio unius exclusio alterius*.

Thus, their agreement in paragraph Tenth provides (fol. 48):

"Tenth: The author to have the right to print and publish the play, but this right is not to be exercised by the author within six months after the production of such play in New York City unless the written consent of the manager has first been obtained."

Similar illustrations are to be found in the provisions that the defendant is not to lease or sublet the play, and that it is to be released for stock only in case it fail in New York City and upon the road.

The reservation in paragraph Tenth, *supra*, is doubly significant. In the first place, the parties therein directed their attention to a definition of the rights of representation reserved to the plaintiff, and confined those rights to mere publication in book form. In the second place, the defendant was so solicitous that there should be no competition between representation by him and representations by the plaintiff that even this right of publication was to cease upon production of the play in New York.

And yet it is seriously argued that this plaintiff, who was thus prevented even from publishing the play in book form during its New York run, could have produced it in New York in mo-

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tion picture theatres for five and ten cents admission, while the defendant was trying to perform his guaranty and make a success of it in the same city at two dollars a seat (fols. 219, 220).

Citations are not required to remind the Court that where there is an exclusive grant followed by express reservations and limitations, others are not to be implied. As said in 13 *Corpus Juris*, page 539:

"The expression in a contract of one or more things of a class implies the exclusion of all not expressed, although, all would have been implied had none been expressed."

The argument on pages 10 and 11 of the plaintiff's brief that the purpose of paragraph Tenth was merely "to delay the exercise by the author of his undoubted right to publish," overlooks that by its very terms its purpose was to declare the author to have the right to print and publish the play. The delay as to the New York run was a qualification of the right thus reserved.

E.

The courts will not easily accept a construction which would permit the plaintiff to produce motion pictures in competition with the defendant's production on the stage.

It must be assumed that the parties in making this contract, were acting in good faith, and that the plaintiff did not intend to reserve to himself rights which would enable him to prevent the defendant from fulfilling his guarantee of at least seventy-five performances during a succession of six seasons, or which would enable the plaintiff at will to render the contract unprofitable to the

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defendant and to take for himself the benefit of any popularity which the defendant should build up for the play by the investment of his time, reputation and money.

The plaintiff drove the unusually favorable bargain of reserving ten per cent. of the gross (not the net) receipts, and thus stood to win even if the defendant lost money in performing his guaranty; but such terms implied that the plaintiff conveyed rights which inherently contained the promise and possibility of profits to the defendant, particularly as the contract committed the defendant to the cost and hazard of a large number of stage performances during each of six theatrical seasons and consequently to large capital outlays for leases of theatres, hiring companies, procuring paraphernalia, advertising, etc.

Indeed, the plaintiff has himself testified (fol. 219) :

"Q33. And what effect has a motion picture performance of a play upon the production of the same play in spoken drama in the same city? A. It would be a most serious handicap to have the same play done in pictures at ten cents, when you are presenting it at two dollars in the theatre."

The courts have frequently discerned the destructive consequences of a motion picture production of the play, synchronously with its production on the stage. (*Harper Bros. v. Klaw*, 232 Fed., 609, 613; *Frohman v. Fitch*, 164 App. Div., 231, 233-4; *Photo-Drama Motion Picture Co. v. Social U. Film Corp.*, 213 Fed., 374, 377). Nowhere is the absurdity from a practical standpoint of the

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plaintiff's contention more thoroughly exposed than in the following language of the brief of his learned counsel in *Frohman v. Fitch*, 164 App. Div., 231, where he said (p. 20):

"Is it conceivable, therefore, that the plaintiff would, in purchasing the exclusive right of production, have consented that Clyde Fitch may reserve the right to give a *similar performance of the play in a ten-cent theatre, in the same city and at the same time that the plaintiff was performing the play, and charging two dollars a seat?* Is it conceivable that he would have consented to a reservation which it is admitted would result in irreparable loss and injury to the plaintiff? It scarcely required the concession found in the case, for the court to take judicial notice, that if Mr. Frohman were to play 'Captain Jinks,' at the Empire Theatre in this city, and charge two dollars a seat, it could only operate to his serious injury to permit another performance of the same play in a motion picture theatre, adjoining the Empire Theatre, at which the charge for admission would be ten cents. If, then, it is fair to assume that Mr. Frohman would not have entered into a contract to purchase the rights he did, if the contract had contained an express exception or reservation which would enable the author to destroy those rights or irreparably injure the plaintiff therein, then it is equally clear that the court will not hold that the author impliedly reserved what he could not have expressly secured with plaintiff's consent. An implied reservation proceeds upon the theory of a tacit or implied acquiescence or consent."

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In *Photo-Drama Motion Picture Co. v. Social U. Film Corp.*, 213 Fed., 374 (aff'd 220 Fed., 448), Judge Hand said (p. 377) :

"It would be absurd to suppose that Kauffman meant to retain the right to compete, certainly as regards motion pictures."

The argument in the plaintiff's brief that the plaintiff would not be likely to reduce his royalties from the spoken play by competing with moving pictures, is well answered by Judge Mayer at page 157. That would depend on what the plaintiff's judgment was as to the success of the spoken drama and as to the price he could get for the motion picture rights. If the spoken play was not succeeding very well, it might readily become very tempting to hold the defendant to his guaranty of seventy-five stage performances a season for six seasons and at the same time sell out the picture rights for a large sum in cash or in royalties. Nothing *a priori* could be predicated of such a situation, except that the defendant would clearly never have intentionally exposed himself to such a risk. Indeed, the contract was scarcely two years old and the spoken play just becoming the great success described in the complaint, when we find the ~~defendant~~ ^{plaintiff} claiming the picture rights, with the result that a truce of four years had to be declared by the agreement of modification (fols. 66-9).

On the other hand, if the defendant got the picture rights, he would be sure not to compete with himself, and not to exercise those rights, except in response to a business advantage in which the

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plaintiff by reason of his extraordinarily favorable royalty arrangement would equally share.

As Judge Mayer forcibly puts the consequences of the plaintiff's interpretation (p. 157):

"In other words, Manners could not lose and Morosco was sure to lose, and practically the same result would follow if the play were released for stock. Courts are not astute to construe contracts with such a result unless the language and intent clearly so require."

The plaintiff's brief asks at page 20:

"If he (the defendant) possessed the motion picture rights, what was there to prevent his producing the play in that form, and not at all as a spoken drama?"

The answer is in paragraphs Third, Fifth, Sixth and Eleventh (fols. 43-9). The defendant contracted to give seventy-five "performances" "in first class theatres with a competent company" for six theatrical seasons, and if he failed to give that number then or during any future season, all his rights in the play reverted except under the conditions which permitted him to release it for stock.

In *Fleischman v. Ferguson*, 223 N. Y., 235, it was held (p. 241):

"A court will endeavor to give the construction most equitable to both parties instead of the construction which will give one of them an unfair and unreasonable advantage over the other."

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F.

The supplemental contract of July 20, 1914, illustrates the intent of the parties to transfer to the defendant the ownership of the play for all production purposes.

Paragraph Seventh of the Supplemental Agreement removes the prohibitions in the Original Agreement upon the defendant's leasing, sub-letting, assigning or selling (fol. 63); and paragraph Fourth of the Supplemental Agreement removes the restriction requiring production by a company with Laurette Taylor in the title role (fol. 58), and allows the defendant to employ as many companies as he might see fit—the paragraph expressly stipulating that the defendant “is hereby given sole and exclusive charge and control.”

Such provisions demonstrate the purpose of the parties, in view of the defendant's successful management, to place the matter of production and representation of the play wholly under the ownership of the defendant, and to leave the plaintiff in the position of an author who, in exchange for most generous royalties, permits another to risk his time and his fortune in the development and exploitation of the work to the fullest.

The attempt on page 15 of plaintiff's brief to construe paragraph Ninth into some sort of recognition that the plaintiff possessed the motion picture rights is in flat contradiction of its purpose as a mere truce between conflicting claims which had then arisen and of its express statement that it is not such a recognition (fol. 68).

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G.

The unbroken tenor of judicial decisions interpreting similar agreements establishes incontestably that the motion picture rights were included.

In *Frohman v. Fitch*, 164 App. Div., 231, wherein the plaintiff was represented by the same counsel as the plaintiff in the present case, the controversy involved the motion picture rights to the play, "Captain Jinks of the Horse Marines." In order to illustrate the similarity of issue, we have paralleled the chief provisions of the two contracts as follows:

Frohman-Fitch Contract.

Whereas, the said party of the first part agrees to write and deliver a play on or before January first, 1901, and

Whereas, the said party of the second part desires the exclusive right to produce or to have produced the said play in the United States of American and in Canada,

Now, therefore, in consideration of the sum of one dollar paid by the said party of the second part to the said party of the first part the said party of the first part and the said party

Present Contract.

Whereas, the party of the first part is the sole and exclusive author and owner of a certain dramatic composition at present entitled "Peg O' My Heart" and

Whereas, the party of the second part wishes to obtain the exclusive right and license to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

Now, therefore in consideration of the premises and of the mutual covenants and promises of the parties of these presents hereinafter contained and in consideration of the sum of

*Motion Picture Rights.**Frohman-Fitch Contract.*

of the second part respectively agree as follows:

1. The said party of the first part agrees to sell, assign and transfer, and hereby does sell, assign and transfer to the said party of the second part, the exclusive right to produce the said play in the United States of America, and in Canada for which sale, assignment and transfer, the said party of the second part agrees to pay to the said party of the first part, or to his authorized agent as follows: The sum of five hundred dollars (\$500) on the signing and execution of this

Present Contract

one dollar, lawful money of the United States, this day by each of the parties hereto to the other in hand paid, the receipt whereof is hereby reciprocally acknowledged, and for other good, valuable and adequate consideration it is hereby understood, covenanted and agreed by and among the parties to the agreement, as follows:

First.—The party of the first part hereby grants, and by these presents hereby does grant to the party of the second part subject to the terms, conditions and limitations hereinafter expressed, the sole and exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

*Motion Picture Rights.**Frohman-Fitch Contract.*

agreement, which sum shall be in advance of author's royalties.

2. Also if the said play is accepted by the said party of the second part on the receipt of the manuscript of the said play, the said party of the second part shall pay to the said party of the first part, or his authorized agent the further sum of five hundred dollars (\$500) which sum shall likewise be in advance of author's royalties.

3. Also the further sum in author's royalties as follows: Five per cent. (5%) on the first four thousand dol-

Present Contract

Second.—The party of the second part in consideration of such grant, hereby agrees to pay to the party of the first part the sum of five hundred dollars (\$500.00) upon the signing and execution of this agreement, the receipt whereof is hereby acknowledged, and which sum shall be in advance of the royalties to accrue to the party of the first part under this agreement, and it is not to be returned to the party of the second part under any circumstances whatsoever, but is to be credited as the payment of the first royalties as hereinafter provided, if the said play shall be produced by the said party of the second part under this agreement.

Fourth.—The party of the second part further agrees to pay to the party of the first part not later than the

*Motion Picture Rights.**Frohman-Fitch Contract.*

lars (\$4,000) gross weekly receipts, ten per cent. (10%) on the next two thousand dollars (\$2,000) gross weekly receipts above for all performances of the said play in the United States of America and in Canada.

7. The said party of the second part agrees to furnish to the said party of the first part, or to his authorized agent, weekly statements of the gross receipts of the said play wherever performed in the United States of America and in Canada, and to make weekly payments of royalties according to the terms of this agreement to the said party of the first part, or to his authorized agent, and the said party of the first part and his authorized agent may at any time examine the entries relating to the gross receipts of the said play in the United States of America and in Canada.

Present Contract

first Wednesday following each and every week during which a performance of the said play shall have been given further sums as royalties as follows: Five per cent. (5%) of the first four thousand five hundred dollars (\$4,500) gross weekly receipts; seven and one-half (7½%) per cent. on the next two thousand dollars (\$2,000) gross weekly receipts; and ten (10%) per cent. on all sums over that amount of six thousand five hundred dollars (\$6,500) gross weekly receipts, which said sum of money, together with certified box office statements, the party of the second part agrees to send to the party of the first part.

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Frohman-Fitch Contract.

4. If the said play is not produced by the said party of the second part within one year following the receipt and acceptance of the said manuscript, the said party of the second part shall then return to the said party of the first part or to his authorized agent all manuscripts of the said play in the possession of the said party of the second part and all rights of the said party of the second part in and to the said play shall cease, and all sums paid by the said party of the second part to the said party of the first part, or to his authorized agent shall belong to the said party of the first part.

5. The said party of the second part agrees to announce the name of the said Clyde Fitch as sole author of the said play on all posters, programmes and other advertising matter connected with the said play.

Present Contract

Fifth.—The said party of the second part further agrees that if during any one theatrical year, such year to begin on the first day of October, said play has not been produced or presented for seventy-five performances, then all the rights of the said party of the second part shall cease and determine, and shall immediately revert to the said party of the first part.

Ninth.—The name of the author to appear on all advertising, reading and printed matter used in connection with the play.

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6. The said party of the second part agrees that should he produce or have produced the said play, to produce it in a first class theatre and in a first class manner.

Present Contract

Sixth.—It is further agreed that the said party of the second part shall present the said play in first class theatres with a competent company, the said company to be mutually satisfactory to both parties to this agreement, and with Miss Laurette Taylor in the title role of "Peg O' My Heart," and that the play will have a production in New York City, and will be continued on the road with Miss Taylor in the part of "Peg" for at least one season or longer if considered advisable by both parties to this agreement.

9. The agreements hereto are binding upon the heirs, executors, administrators or representatives of the parties hereabove mentioned.

Thirteenth.—This agreement is binding upon the parties hereto, upon their heirs, executors, assigns, administrators and successors.

The two contracts are thus shown to be so similar in scheme, provisions and phraseology that the present contract must have been modelled on the *Frohman* contract or on some common original.

The Appellate Division held that under the con-

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tract before it the moving picture rights were included in the general grant of the producing rights, and said (p. 233) :

"The contract, as we have seen, gave the plaintiff the 'exclusive right to produce or to have produced the said play in the United States of America and in Canada.' This exclusive right was to protect the plaintiff in the property which he had purchased. That the plaintiff's rights under the contract constituted property cannot be questioned. That by the aid of science it has, since the contract was executed, been made possible to produce the play in some manner not then contemplated, does not give William G. Fitch nor the American Play Company the right to destroy plaintiff's property or diminish the value of what he purchased. The fact that the plaintiff agreed to produce the play only in first class theatres and in a first class manner does not contemplate that the author of the play reserved to himself the right to produce it in a second class theatre in a second class manner. On the contrary, this provision was inserted in the contract to protect the author of the play by insuring to him that his production should only be produced in a creditable place and in such a way as would add to his reputation."

This case was cited with approval in *Klein v. Beach*, 239 Fed. C. C. A., 108, 109; by Judge Mayer in *Klein v. Beach*, 232 Fed., 240, 246; and by Judge Hough in *Harper Bros. v. Klaw & Erlanger*, 232 Fed., 609, 613.

In *Lipzin v. Gordin*, 166 N. Y. Supp., 792, the

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agreement as to the producing rights read as follows (to quote the language of the opinion):

"The second recital of the agreement states 'Whereas said Michael Mintz is desirous of securing to himself the exclusive right of producing, playing and performing or causing to be produced, played or performed, said play or drama for said Kenny Mintz Lipzin' and is in entire harmony with the idea that Michael Mintz merely was mentioned in the capacity of agent of his wife, Kenny Mintz Lipzin. The agreement in clear and unmistakable language confers upon Michael Mintz the exclusive license for a term of 24 years 'to play, perform and produce or to cause to be played, performed, and produced said play or drama entitled as aforesaid' [referring to the play or drama entitled 'Die Schechite,' written in Yiddish by the deceased, Jacob Gordin, a well-known author and dramatist]."

The Court held that this general grant of the producing rights carried with it the moving picture rights and said (p. 793):

"The effect of the agreement was to grant for the term mentioned the exclusive rights of production of the play. There is nothing in the instrument that would warrant the inference that the production was limited to Madame Lipzin in the Yiddish dialect or that the author had any reserved rights of production of the translation of the play in languages other than the Yiddish language. This being so, such evidence as the Court permitted the defendant to introduce upon the trial, upon defendants' theory that it would tend to explain or interpret the meaning of the contract, cannot be available to impeach or contradict its plain terms. *The exclusive*

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license to produce the play carried with it the right of production of moving pictures thereof in films (Frohman v. Fitch, 164 App. Div., 231; 149 N. Y. Supp., 633, December 19, 1914)."

In *Hart v. Fox*, 166 N. Y. Supplement, 793, there was a sale of the performing rights in the dialogue of the play "Song of Hate," based on "La Tosca," by Victorien Sardou, and one of the questions was whether the sale covered the motion picture rights. The agreement with Sardou (as we have ascertained from an examination of the papers furnished by counsel in the case), contained as its granting clause the following:

"Mr. Sardou sells and assigns to Mrs. Fannie Davenport Price the exclusive right to play or cause to be played in all languages in the United States of America and Canada his new piece in five acts entitled, 'La Tosca,' the manuscript and all his rights, title and interest in the said manuscript in the said countries."

Nothing at all was said in that agreement about motion picture rights, and yet the court had no difficulty in holding (p. 797):

"The picture was based on the play, and that satisfied the agreement. *Nor is there any doubt that the performing rights in the dialogue carried with it the right to produce the play upon the screen.* Frohman v. Fitch, 164 App. Div., 231; 149 N. Y. Supp., 633; Lipzin v. Gordin, 166 N.Y. Supp., 792, Greenbaum, J.; Harper v. Klaw & E. (D. C.), 232 Fed., 609; Kalem Co. v. Harper Bros., 222 U. S., 55; 32 Sup. Ct., 20; 56 L. Ed., 92, Ann. Cas., 1913A, 1285."

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In *Photo Drama Motion Picture Co., Inc. v. Social Uplift Film Corporation*, 220 Fed. (C. C. A.), 448, suit was brought to enforce rights to exclusive production of certain motion pictures under the copyright statutes. The case turned upon the recording of an assignment of copyright, but in the course of his opinion, Judge Lacombe said, at page 450:

"The case here presented is unlike some of those cited on appellant's brief, where the author of a book or of a play has assigned to some one all the dramatic rights thereto without reservation. Such an assignment conveys the right to acquire a copyright under the statute which will give an exclusive right to both an old-style dramatization and the modern variant, a motion picture presentation of the drama."

Kalem Co. v. Harper Bros., 222 U. S., 55, is to the effect that the depicting of the book "Ben Hur" in motion pictures is "*performing or representing*" the book within the meaning of the Copyright Law and hence an infringement of the copyright. Mr. Justice Holmes said at page 61:

"It would be impossible to deny the title of drama to pantomime as played by masters of the art. *Daly v. Palmer*, 6 Blatchf., 256, 264. But if a pantomime of Ben Hur would be a dramatizing of Ben Hur, it would be none the less so that it was exhibited to the audience by reflection from a glass and not by direct vision of the figures—as sometimes has been done in order to produce ghostly or inexplicable effects. The essence of the matter in the case last supposed is not the mechanism employed but, that we see the event or

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story lived. The moving pictures are only less vivid than reflections from a mirror. With the former as with the latter our visual impression—what we see—is caused by the real pantomime of real men through the medium of natural forces, although the machinery is different and more complex.”

The same thought was expressed by the Circuit Court of Appeals in that case (169 Fed., 61, 63).

The plaintiff's brief argues (p. 22) that the *Kalem* case had to do only with the meaning of the words “perform” and “represent” a drama as used in the Copyright Law. In reply, we quote as follows from the brief of the learned counsel for the present plaintiff, in the case of *Frohman v. Fitch* (164 App. Div., 231), where he desired to forestall just such an attempt to distinguish the *Kalem* case (p. 9):

“The Court, in that case, construed the words ‘performance’ and ‘representation’ of a drama in the statute, while this Court has before it the same question on the construction of the same words in a contract. Plaintiff acquired in this case by contract, precisely what Klaw & Erlanger secured under the statute, in the case cited by arrangement with the author and owners of the copyright of ‘Ben Hur.’”

In *Klaw v. General Co.*, 154 N. Y. Supp., 988, it was held:

“In *Kalem Co. v. Harper*, 222 U. S., 55, it is held that the owner of dramatic rights might forbid the dramatic representation by moving pictures.”

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In *Universal Film Manufacturing Company v. Copperman*, 212 Fed., 301 (affirmed, 218 Fed., 557), the question was as to a motion picture photo play, entitled. "The Great Circus Catastrophe." In passing on the damages to be awarded to the defendants, because complainants had impounded their film, pending the suit, the Court (per Judge Hough) said (p. 581):

"It follows that the next query is what kind of business was prevented by the seizure of this film? Reflection has only strengthened the belief that the business was that of giving a show or play; it really makes no difference that the play is mechanically produced; if there is no film there is no play, and unless the play is projected upon a screen the idle film is worthless. The value of the film depends entirely upon the popularity of the play. Therefore, I think the analogy between this case and preventing the giving of a dramatic performance is complete."

In *Liebler & Co. v. Bobbs-Merrill Co.*, 162 App. Div., 900, the plaintiff acquired from the defendant, the publisher of a novel entitled, "In the Bishop's Carriage," the "exclusive dramatic rights of the said novel." The plaintiff thereafter sought to enjoin the defendant from authorizing a moving picture production of a dramatization of the novel. An injunction was granted *pendente lite*, and the order was affirmed by the Appellate Division without opinion.

Drone, in his work on *Copyright*, page 588, says:

"In many dramas, important scenes are represented on the stage by action without words, and hence can only be described in

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written language. A pantomime or a ballet may be a drama. The acting of either is a *dramatic representation*; the written description or directions for the actors is a dramatic composition in which the action or story is narrated. *Indeed, many scenes or occurrences constituting in themselves dramas or material parts of dramas can be represented on the stage by action alone; in language they can only be described. Yet, they are dramatic productions*" See also pp. 593-594).

See also,

Brackett's Theatrical Law, p. 61

In *Lee v. Simpson*, 3 Common Bench Reports, page 871 (See pp. 881-882), the pantomime "Princess Battledore" or "Harlequin Shuttlecock" was protected under the English Copyright Act (3 and 4 W., 4 C., 15). Some of the most profitable stage productions have been pantomimes, such as "Humpty Dumpty," "Bluebeard," etc. It is the custom in London, about Christmas time, to give elaborate stage productions of pantomimes.

H.

Cases cited by plaintiff, distinguished.

The chief reliance of the plaintiff is on *Klein v. Beach*, 232 Fed., 240, 239 Fed., 109.

The distinction is that aptly pointed out by Judge Mayer at folios 467-9, and by the Court of Appeals on page 162. In the *Klein* case, the preambles and the granting clause were expressly limited:

"Whereas, the novelist is the sole owner of the *dramatic rights* of a certain original novel entitled 'The Ne'er Do Well'; and

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"Whereas, the manager wishes to engage the service of the author to dramatize the said book *for presentation on the stage* * * *

"First.—The novelist hereby grants to the author the sole and exclusive right to dramatize the said book *for presentation on the stage* * * *

"Second.—The author and the novelist hereby agree to grant and * * * do grant to the manager * * * the sole and exclusive license and liberty to produce, perform and represent the said play or dramatic composition *on the stage.* * * *

Throughout the contract, the words, "*on the stage*" were used. Judge Mayer said (p. 246):

"The 'exclusive right to dramatize' the novel 'for presentation on the stage' merely meant that no one else was to be permitted to dramatize for the stage, but did not comprehend that Beach could not grant the right to another independently to dramatize the novel for the screen."

The decision of the court was that the right to dramatize the novel "for presentation on the stage" did not carry with it the right to produce it in motion pictures. Commenting on *Frohman v. Fitch*, 164 App. Div., 231, *supra*, Judge Mayer said at page 246:

"Fitch, who had agreed to write and deliver a play, had sold his original work to Frohman under a broad grant which clearly comprehended the ownership of Fitch's work by Frohman for all purposes."

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Klein v. Beach, went to the Circuit Court of Appeals on appeal and was affirmed (239 Fed., 108). Judge Hand, in his opinion, said:

"The turning point in this case is the scope of the grant, whether by its terms it conferred upon Klein dramatic rights in the larger sense including presentation, not only by living actors, but also by motion pictures, or whether it was limited to 'the stage' proper. The actual words of grant are these:

"The sole and exclusive right to dramatize the said book for presentation on the stage."

*"The plaintiff insists, in view of Kalem Co. v. Harper, 222 U.S., 55; 32 Sup. Ct., 20; 56 L. Ed., 92 Ann. Cas. 1913A, 1285, and Frohman v. Fitch, 164 App. Div., 232; 149 N. Y. Supp., 633, that dramatic rights include motion picture rights. If used alone, that is doubtless true, especially if the contract antedate the commercial use of motion picture. * * **

*"We start therefore with a grant prima facie of 'stage' rights only. In the preamble of the contract the distinction is already indicated between 'stage' rights and general dramatic rights; thus Beach is recited as having 'dramatic' rights, while Klein has only 'dramatized' the said book for presentation on the stage, which is to result in a 'play,' the exclusive rights of which are to be given to the Authors' Producing Company. The grant follows the scheme of the preamble. * * **

"In general it is quite clear that this was the pervading purpose of the parties. Klein was to make a play out of the book, and the Author's Producing Company was to produce it; if they failed, Klein and Beach might try it together. There is no intimation that Klein should have further rights to make, not a play,

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but a motion picture scenario. Such a scenario is hardly a 'play' for, 'presentation on the stage.'"

In the *Klein* case as pointed out in the opinion, the preambles and the grant distinguish between the "dramatic rights" resident in the grantor-author, and the conveyed right only "to dramatize the said book for presentation on the stage." This made it evident that the owner of "the dramatic rights" was not granting all of them but was reserving to himself everything beyond the right to present "on the stage." In the present case, however, the reverse is the case, and no distinction is made between the producing rights which the plaintiff had and those which he conveyed except in the single particular which the parties themselves were careful to define, to wit, the right to publish the play in book form under certain conditions for a limited period of time (fol. 48).

The case of *Harper Bros. v. Klaw*, 232 Fed., 609, is likewise to be distinguished on the ground of the narrowness of the grant. There, Judge Hough, in referring to the *Kalem* case, said (p. 612):

"If by the agreement of 1899 the defendant had been granted the exclusive right of dramatizing *Ben Hur* or producing any play or plays that might be made out of *Ben Hur*, there would be no doubt at all as to their right to make a 'movie' play, as well as the kind of play as has been heretofore produced."

Judge Hough then proceeded to comment on the narrowness of the preamble, which was that the defendants were to obtain "the exclusive right of

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producing such dramatic version 'on the stage,' and on the narrowness of the granting clause, which granted the sole right of "producing on the stage." He then said (p. 613):

"This differentiates the case at bar from *Frohman v. Fitch*, 164 App. Div., 231, with which I fully concur; but these defendants never got so ample a grant as did Mr. Frohman."

The English cases cited in the plaintiff's brief have absolutely no bearing.

Heap v. Hartley, 42 L. R. Ch. Div. (1889), 461, decides merely that "a license not coupled with or equivalent to a grant did not entitle the licensee to sue in his own name without joining the patentee." In *London Printing & Pub. Alliance v. Cox*, 7 The Times Law Rep. (1891), 738, the same principle was applied to a copyright. *Stevens v. Benning*, 1 Kay & Johnson's Rep., 168, merely held that a contract by an author to write a book and to allow the other party to publish it for a certain period was a personal contract and not an assignment of the copyright. In *Tuck v. Canton*, 51 L. J. N. S. (1882) (Part 2), pp. 363-5, the plaintiff, though held to be a licensee, was adjudged entitled to judgment against an infringer of copyright. *Neilson v. Horniman*, 26 The Times Law Rep. (1909), 188, is an authority for, rather than against, the defendant, for there it was held:

"As the plaintiff did not hold an assignment of the acting rights but only a 'sole license,' he had no title to sue in his own name."

In the present case, the contract contains a "grant;" the thing transferred is not a naked license

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but a "right" (fol. 39); it carried not only the acting rights (fol. 46), but all the production rights, exclusive of even the author; and the agreement was so impersonal that it bound the parties' heirs, executors, assigns, administrators and successors" (fol. 50).

I.

The fact that certain provisions of the contract have to do with production in spoken form, in no wise limits the grant.

The plaintiff argues that the contract is a mere license—a personal privilege—and not a grant or transfer of property.

In discussing the duration of the contract (p. 14), we have already shown that the sale for a price of the production rights in a play does more than give a personal license or privilege. It is a grant or transfer of property.

The word "license" in this contract was not used in any such technical sense. It imports a "right," as indicated in the second recital of the original agreement expressing the wish of the defendant "to obtain the exclusive *right* and license to produce, perform and represent the said play" (fol. 39). The body of the contract provides that if the play be not produced for the stipulated number of performances, then "all *rights*" of the defendant shall cease and determine (fol. 45); and forbids any assignment by the defendant of "any of his aforesaid *rights* in and to the said dramatic composition or play" without the plaintiff's consent (fol. 49). The modified agreement, in its turn, provides that the defendant may lease, sublet, assign or sell "any of his *rights* acquired under the

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said original agreement or this supplemental agreement" (fol. 63-4).

Nor is the so-called license merely personal, for rights which bind not only the parties but also their "heirs, executors, assigns, administrators and successors" (fol. 50), are not merely personal. As said by Judge Manton below (p. 161):

"An agreement for production rights binding the parties' heirs, executors, assignees, administrators and successors, is an assignment and not a mere license (*Photodrama Motion Picture Co. v. U-Film Corp.*, 213 Fed., 374; *aff'd* 220 Fed. Rep., 448)."

Nor is the so-called license revocable, for, since it was bought and paid for, and coupled with a continuing interest upon a continuing consideration for a stipulated term, and connected with the enjoyment of the rights acquired, it is not revocable. As said, in 25 *Cyc.*, 649:

"Where a license to use property for specific purposes under a contract perpetual in its purport, is not specially restricted and is coupled with an interest necessary to the possession and enjoyment of the rights acquired, then the license is irrevocable so long as the interest continues."

Even a contract for personal service, where it is coupled with an interest, is not terminable at the will of the employer (*Harrington v. K. C. Cable R. Co.*, 60 Mo. Appeals, 223, 227, 229).

The plaintiff by endeavoring to attach some technical, legal significance to the word license becomes bound to attach a like technical, legal significance to the term "*grant*" as used in the

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same sentence (fol. 41); and yet, we take it, the plaintiff would loudly protest against construing the word "grant" as importing a conveyance of property. We do not assume, however, that the parties were attaching to these terms the specialized meaning which they may have acquired in certain branches of the law, or that, if they did, the situation is in any way affected.

Even Judge Ward did not regard the contract as a license, but conceded that "the words of the grant are large enough to cover the picture rights" (p. 164).

Since, therefore, the contract conveyed all the property rights in the play as a production, and granted "the sole and exclusive right to produce," the mere fact that certain of the ensuing clauses had to do with "performances" "in first class theatres" can in no wise restrict the terms of the grant.

The plaintiff guaranteed to give a stated minimum of such performances and made all his rights conditional upon meeting that minimum. Naturally the contract particularized on that subject at some length.

Such a method of restricting the indisputable terms of the grant would equally have led to the opposite result in the cases above cited—particularly in *Frohman v. Fitch*, the principles of which have been the unchallenged law of these contracts until this case arose. In the *Frohman* case, the contract was no less silent as to motion picture rights, and to no less a degree contained clause after clause which seemingly had to do with the spoken play alone. Thus there was the same provision for royalties based solely on the

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gross weekly receipts; there was the same use of the word "play"; there was the same agreement to produce in first-class theatres and in a first-class manner; there was the same agreement for publicity for the name of the author "of the said play"; and there was the same description of the representations as "performances." The answer of the Court, however, was, in effect, that the preambles and the granting clause showed an intent to convey all the producing rights, and that the clauses which had to do with the production of the spoken play did not exclude the right to produce the motion pictures, but rather were applicable solely to instances of production on the stage.

In *Dickson v. Wildman*, 183 Fed. (C. C. A.), 398, it was held on the authority of a multitude of cases (p. 403):

"The granting clause is naturally looked to to see what it was intended to convey, whereas recitals are often merely introductory, and are not a necessary part of the deed. *The granting clause is the very essence of the contract.* It is required to transfer title, but the habendum clause is not absolutely necessary to make a deed effective. Where a conflict exists, therefore, in the different parts of a deed, the true intent of the grantor as to what was intended to be conveyed is more likely to be found in the granting clause. The settled rule of construction in Alabama and in many other jurisdictions is that in case of repugnancy between the granting clause and other parts of the deed the former will prevail."

The granting clause in a deed or contract is controlling as to the property conveyed and cannot be restricted by inference or implication from subsequent clauses.

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Am. & Eng. Encyc. (2nd Ed.), Vol. 17,
p. 8;

Stuart *v.* Easton, 170 U. S., 383, 393, 401;

Mott *v.* Richtmyer, 57 N. Y., 49, 63;

Matter of City of New York, 216 N. Y., 67,
75;

Holmes *v.* Hubbard, 60 N. Y., 183, 186.

J.

The claim that there is some repugnancy between the provisions for royalties and a production in motion picture, is unwarranted.

Production in motion picture form has its gross weekly receipts precisely as does a spoken production. If the defendant produced on the screen he could quite as easily pay a percentage of his gross weekly receipts to the plaintiff as if he produced on the stage; and if he availed himself of his right under the modifying contract to let out such right of production, the plaintiff's right to the stipulated royalties would not be affected thereby (fol. 64). The only result would be that the defendant would be bound to make an arrangement whereby he could fulfill his personal obligation for the plaintiff's royalties (fol. 64).

In many of the cases above cited the contracts in question resemble the present contract, in that they provided for a royalty to the author based upon the gross receipts of the play, and were silent as to any special arrangements governing the profits from production in motion picture form; and yet the courts had no difficulty in holding that the contract included a transfer of the motion picture rights. Thus, in the *Frohman* case, *supra*, the only provision for a royalty was a percentage of the gross receipts; and in the

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Lipzin case, *supra*, the author was only to receive "a royalty of five dollars for each and every performance of the play." In the present contract, however, there are not only provisions for the payment to the plaintiff of a percentage upon the gross receipts, but also provisions in certain cases for the payment to him of one-half of amounts received. One or the other of these provisions is bound to be applicable to any use which the defendant may make of the motion picture rights.

This very contention by the plaintiff was answered as follows in the brief of his learned counsel in *Frohman v. Fitch*, 164 App. Div., 231, (Reply Brief, p. 3):

"Defendants suggest that the amount of royalties to be paid, should Frohman give motion picture performances, is not provided for in the contract.

"It is provided for in Article 3. He must pay the specified percentage of the *gross* weekly receipts taken in at the performances" (fol. 35).

In other words, in that case, the present plaintiff's distinguished counsel *did not consider* that a covenant to pay the author royalties of five per cent. on the "gross weekly receipts for all performances of the said play," *was in any way not adaptable or not applicable to a production in motion pictures*. In the present case, however, he *does*.

K.

Nothing in the provision forbidding alterations, eliminations or additions to be made in the play without the approval of the author, prevents motion picture productions.

As pointed out by Judge Mayer, any such contention is "not persuasive in view of the *Kalem* and

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Frohman v. Filch cases" (fol. 473). If a moving picture representation is something different as a dramatization from the play itself, then the Court in the *Kalem* case should have held that there was no infringement, and the Court in the *Frohman* case should have held that the motion picture rights were not included in the grant of the production rights of the play.

Under Paragraph Seventh no alterations are to be made "in the play," as distinct from the various methods of presenting the play to the public.

As said by Judge Mayer of this paragraph in his opinion in *Manners v. Famous Players-Lasky Corporation*, attached to the plaintiff's brief herein (p. 29) :

"It is obvious that a spoken play cannot be literally reproduced on the screen. The screen must convey by pantomimic action and legends or concise statements, whether by way of narrative or dialogue, the subject matter and action of the play. Therefore, an alteration, elimination or addition which is faithfully consistent with the plan and sequence of the play, cannot be held to be an alteration, elimination or addition prohibited under the Seventh paragraph without the consent of the author."

Would the plaintiff claim that because of this clause the defendant could not have presented the play in pantomime by living actors upon the stage or with the aid of a mirror? Yet these are the very tests which in the *Kalem* case, 222 U. S., 55, 61, the Supreme Court of the United States laid down for determining whether a motion picture presentation would be an infringement of the copyright of the play. As said therein (p. 61) :

"Drama may be achieved by action as well

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as by speech. Action can tell a story, display all the most vivid relations between men, and depict every kind of human emotion without the aid of a word. * * * The essence of the matter in the last case supposed (a mirror) is not the mechanism employed, but that we see the event or story lived. The moving pictures are not less vivid than reflections from a mirror."

In other words, Paragraph Seventh is a guarantee that the public are to see "the event or story lived" precisely as the plaintiff composed it, whether its presentation be by word of mouth, pantomime, reflection in a mirror, moving picture, or any other medium.

A mere descriptive legend or statement to aid the understanding of the pictures, is no more a violation of paragraph Seventh than would be a like aid to a pantomimic production or a summary on a theatre program.

The identity to be preserved by this paragraph is the similitude of the impressions and action. As said in *United States v. Motion Picture Patents Co.*, 225 Fed., 800, 803, appeal dismissed, 247 U. S., 524:

"It has been settled by the decisions under the earlier copyright laws, that the copyright of a dramatization covered a photo-play presentation of the same subject. This was based upon the recognition of, what every observer experiences, *the similitude, if not identity, of the impressions received from seeing a photo-play and from the same play acted out by actors living and moving before his eyes.*"

The difference between the manuscript of a stage drama or the legends which help to understand the story and a motion picture representation

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thereof is aptly illustrated in *Parton v. Prang*, 3 Cliff, 537, Fed., Case No. 10, 784, where the court contrasts a painting with a word description thereof:

"The manuscript is a description of the object and not the presentation of the object itself or its portrait, as the manuscript while it remains that character, is simply the registry of certain thoughts or ideas about a thing and not the exhibition of the thing itself as in the case of a picture."

THIRD POINT.

The trial court did not err in excluding the contract with Laurette Taylor.

This contract was made on July 8, 1912, between the defendant and Laurette Taylor (Plaintiff's Exhibit 8 for Identification). In it the defendant employed Laurette Taylor as a star for the seasons of 1912-1913, 1913-1914 and 1914-1915, with the *option* of continuing her services for the seasons of 1915-1916, 1916-1917 and 1917-1918. No possible significance can attach to this contract, because (1) (as shown in our First Point, p. 13) the period of seasons in Paragraph Third of the original contract between the plaintiff and the defendant included the season of 1918-1919; (2) the contract with Laurette Taylor was not limited to "Peg O'My Heart," but included "the leading female character of any other plays that may be suited to the talent and ability of said artist" (fol. 334); and (3) the defendant did not make a firm contract with Miss Taylor for five years but only for three, with an option for three more. Naturally,

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the defendant did not contemplate making a contract with Miss Taylor beyond the period of his own affirmative guarantee to the plaintiff; and naturally, Miss Taylor would not have been willing to tie herself up for life.

FOURTH POINT.

The trial court did not err in excluding the question of plaintiff's counsel as to the identity of the person who drew the agreement of January 19, 1912.

The reasons given by the U. S. Circuit Court of Appeals, pp. 162-3, are conclusive. See also *Caine v. Hagenbarth*, 37 Utah, 69, 94, approving 2 *Page on Contracts*, Sec. 1122; *Hull Coal & Coke Co. v. Empire Coal & Coke Co.*, 113 Fed., C. C. A., 256, 258; and 2 *Page on Contracts*, Sec. 1122, p. 1745.

FIFTH POINT.

The trial court did not err in excluding evidence as to the manner and method of conducting the motion picture business.

The offer of evidence was rejected because irrelevant (fol. 211), both the Court and the defendant's counsel stating that they assumed that the plaintiff would testify in accordance with the offer (fols. 223-4, 231). The defendant's counsel, however, did not concede the facts to be as the plaintiff might testify, and reserved the right to cross examine him and to produce contradicting evidence, in case the evidence thus offered should ever be deemed relevant (fols. 226, 228, 231).

On the merits, it is obvious that the provision

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in the original contract against subletting or leasing no more prevented the defendant from producing the play in motion-picture form than it prevented him from producing it on the stage—in the first place, because that prohibition has been eliminated by the supplemental contract, and, in the second place, because the defendant could himself give his own motion picture shows precisely as he gave his own stage productions, without the intervention of any lessee.

As to the provision for royalties, we have already shown that that in no way worked against the inclusion of the motion picture rights (*supra*, Second Point, (p. 61). Whether the defendant produced the play in motion picture form or on the stage, he would have box-office receipts on which the plaintiff would be entitled to the stipulated royalties; and, under the supplemental contract, if the defendant sublet or leased any of his production rights, he still remained under this same personal obligation to pay royalties to the plaintiff (fol. 64). There would be no more difficulty in such case than there would be in a case where the defendant leased or sublet the stage rights, as he was expressly permitted to do by the supplemental agreement.

The mere fact that the defendant might not be entitled to produce motion pictures under arrangements which would be inconsistent with the plaintiff's right to royalties, is not an argument against the defendant's possession of the production right, but merely against the particular manner of its exercise.

CONCLUSION.

The decree should be affirmed, with costs.

Dated, New York, February 21st, 1920.

Respectfully submitted,

CHARLES H. TUTTLE,
WILLIAM KLEIN,
Of Counsel.

No. 370.

FEB 28 1920

JAMES D. WARD

Supreme Court of the United States,

OCTOBER TERM, 1919.

J. HARTLEY MANNERS,

Petitioner,

against

OLIVER MOROSCO.

REPLY BRIEF ON BEHALF OF PETITIONER.

DAVID GERBER,

WILLIAM J. HUGHES,

Counsel for Petitioner.

Supreme Court of the United States,

OCTOBER TERM, 1919.

J. HARTLEY MANNERS,
Petitioner,

AGAINST

OLIVER MOROSCO,
Respondent.

No. 370.

**REPLY BRIEF ON BEHALF OF
PETITIONER.**

I.

Counsel for Respondent in their brief under Third Point (p. 39), say:

"The plaintiff's brief asks at page 20: 'If he (the defendant) possessed the motion picture rights, what was there to prevent his producing the play in that form, and not at all as a spoken drama?' The answer is in paragraphs Third, Fifth, Sixth and Eleventh (fols. 43-49). The defendant contracted to give seventy-five 'performances' 'in first-class theatres with a competent company' for six theatrical seasons, and if he failed to give that number then or during any future season, all his rights in the play reverted, except under the conditions which permitted him to release it for stock."

If, as is now for the first time admitted, the license, by reason of these paragraphs, means that the performances mentioned must be given in

spoken drama, where does counsel find, anywhere in the agreement, the right to produce the play in other than first-class theatres or by means of motion pictures?

We have at last the concession—in support of our contention—that the enumerated provisions call for a performance of the play by living actors only. These clauses embrace the rights accorded to respondent and obligations assumed by him respecting the kind of performances authorized by the license. In other words, the contract covers only a “presentation on the stage” as construed in *Klein v. Beach*, 239 Fed. Rep. 108.

Again we ask, what clause is there in the license which relates to motion picture exhibitions, distinct from the performances required or authorized under paragraphs third, fifth, sixth and eleventh, referred to by counsel?

“We should remember that the contract must be so construed as to give meaning to all its provisions, and that that interpretation would be incorrect which would obliterate one portion of the contract in order to enforce another part thereof.”

Burdon Central Sugar Refining Co. v. Payne, 167 U. S. 127-142.

II.

Referring to paragraph “seventh” of the contract forbidding alterations, eliminations or additions in the play, counsel ask:

“Would the appellant claim that because of this clause, the defendant could not have presented the play in pantomime by living actors upon the stage or with the aid of a mirror? (Respondent’s brief, p. 64).”

Categorically answering, we say that the respondent could *not* under a license prohibiting alterations, eliminations or additions, eliminate the entire dialogue and perform the play as a pantomime or with the aid of a mirror.

Counsel continuing their argument, say:

"Yet these are the very tests which in the *Kalem* case, 222 U. S. 55, 61, the Supreme Court of the United States laid down for determining whether a motion picture presentation would be an infringement of the copyright of the play."

As we stated in our main brief, this Court in the *Kalem* case had before it an alleged infringement of complainants' copyrighted book and play and held, in effect, that to present a play in pantomimic form or by living actors with the aid of a mirror, called for the dramatization of the book and therefore would violate the author's exclusive right of dramatization.

III.

Counsel contend that the supplemental contract of July 20th, 1914, illustrates the intention of the parties to transfer to defendant the ownership of the play for all production purposes (Second Point, Respondent's brief, p. 40).

We cannot follow or grasp the argument of the learned counsel in this respect. Petitioner's contention is and always was, that the life of the license was five years or theatrical seasons. The force of this contention is emphasized, if we place a comma following the word "thereafter" found in

the third paragraph of the license. This paragraph would then read as follows:

"The party of the second part (Morosco) agrees to produce the play not later than January first, 1913 and to continue the said play for at least seventy-five performances during the season 1913-1914 and for each theatrical season thereafter, for a period of five years."
(Record p. 108, fol. 323.)

The first season being that of 1913-1914, the end of the five-year period would follow the termination of the theatrical season of 1917-1918. At the time the modification agreement was entered into, the respondent contended and reiterates that contention (Respondent's brief, p. 25), that the season of 1913-1914 should not be included in the computation, for the reason that the word "thereafter" should be construed to mean five theatrical seasons following—not including—the season of 1913-1914. Because of this dispute, paragraph "ninth" of the modification agreement, which prohibited petitioner (as well as defendant) from giving or authorizing a motion picture exhibition, fixed the period as four years from the date of the contract—that is to say down to the end of the season of 1917-1918, leaving open the question whether the respondent, as he then contended and now contends, had any rights under the license "after the expiration of said four-year period".

Respectfully submitted,

DAVID GERBER,
WILLIAM J. HUGHES,
Counsel for Petitioner.

Argument for Petitioner.

MANNERS v. MOROSCO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT.

No. 370. Argued March 2, 1920.—Decided March 22, 1920.

Plaintiff, a dramatic author, granted defendant the "sole and exclusive license and liberty to produce, perform and represent" his copyrighted play in the United States and Canada, defendant agreeing to produce it "not later than January first, 1913, and to continue . . . for at least seventy-five performances during the season of 1913-1914 and for each theatrical season thereafter for a period of five years;" in default of 75 performances in any one theatrical year, all of defendant's rights were to revert to plaintiff; the play was to be presented in first-class theaters with competent companies and with a designated actress in the title rôle, a percentage of the gross receipts going to plaintiff as royalties; if it failed, it was to be let to stock companies, and the royalties thus accruing were to be divided equally between the parties; rehearsal and production were to be under the plaintiff's direction; no changes in the play were to be made without his approval, and he was to have the right to print and publish it, but not within six months of its first production without defendant's consent.

Held: (1) That the grant was not limited to five years' duration. P. 325.

(2) It did not convey the right to represent the play in motion pictures. *Id.*

(3) There was an implied covenant by the grantor not to use the reserved motion picture rights to the destruction of the rights granted. P. 326.

(4) Plaintiff is entitled to an injunction against representation in motion pictures, but upon condition that he also shall abstain from representing or authorizing representation in that form in Canada or the United States. *Id.*

258 Fed. Rep. 557, reversed.

THE case is stated in the opinion.

Mr. David Gerber, with whom Mr. William J. Hughes was on the briefs, for petitioner:

The situation of the parties at the time the contract was entered into, and their acts in performance thereunder, are at war with the belated claim of respondent that he had the right to use the drama as the basis for a photoplay.

The contract is not a grant or assignment—but a license to produce the play in the United States and Canada, subject to “the terms, conditions and limitations” therein expressed, and every “term,” “condition” or “limitation” is applicable only to a production of the play as a spoken drama, and inappropriate to the use of petitioner’s literary work as the basis for a scenario for a photoplay or screen performance. *Heap v. Hartley*, 42 L. R. Ch. Div. 461; *London Printing & Publishing Alliance v. Cox*, 7 Times L. R. 738; *Neilson v. Horniman*, 26 Times L. R. 188; *Stevens v. Benning*, 1 Kay & J. 168; *Tuck v. Canton*, 51 L. J. (N. S.) pt. 2, pp. 363–365; *Lucas v. Cooke*, 13 L. R. Ch. Div. 872; *McIntosh v. Miner*, 37 App. Div. 483; *Harper Bros. v. Klaw*, 232 Fed. Rep. 609, 612; *Universal Film Mfg. Co. v. Copperman*, 218 Fed. Rep. 577–578; *Photo Drama Motion Picture Co. v. Social Uplift Film Corp.*, 213 Fed. Rep. 374–377; *New Fiction Publishing Co. v. Star Co.*, 220 Fed. Rep. 994–995; *London v. Biograph Co.*, 231 Fed. Rep. 696–697; *Klein v. Beach*, 239 Fed. Rep. 108, 110.

The modification of the contract, made July 20, 1914, somewhat reflects what was in the minds of the parties in January, 1912.

The word “represent” used in the contract, cannot be construed as referring to a motion picture, as distinct from the play. *Routledge v. Low*, L. R. 3; H. L. 100; *Black v. Imperial Book Co.*, 8 Ont. L. R. 9; *Smiles v. Belford*, 1 Ont. App. 436; *Murray v. Elliston*, 5 Barn. & Ald. 657; *Duck v. Bates*, 13 L. R. Q. B. 843; *Chappell v. Boosey*, 21 L. R. Ch. Div. 232.

The provision that the author would not exercise his

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right to print the play until six months after its production in New York City, is not a limitation of the reserved rights possessed by the author. Its purpose is to delay the exercise by the author of his undoubted right to publish the play until six months after the stage representation in New York City, not otherwise to limit or grant to respondent his reserved rights.

The fact that petitioner retained the motion picture rights is not inconsistent with a license limited to a representation of the play as a spoken drama.

It would be an act of folly for the author to destroy the value of his play as a spoken drama by giving motion picture performances. He might also have published his play without copyright protection six months after its first representation in New York City, and thus have made it common property. With the loss of his common-law rights would have fallen the rights claimed by respondent. *Soci  t   Des Films Menchen v. Vitagraph Co.*, 251 Fed. Rep. 258.

By the amendment to § 5 of the Copyright Act of 1912, 37 Stat. 488, motion picture photoplays are classified apart from dramatic or musical compositions (subdivisions *l* and *m*). These rights are separable; "there might be a copyright for a dramatization of the old sort (acted on a stage) and also a copyright for a dramatization of the new sort (arranged in motion pictures)." *Photo Drama Motion Picture Co. v. Social Uplift Film Corp.*, 220 Fed. Rep. 448, 449.

In *Klein v. Beach*, 239 Fed. Rep. 108, the exclusive right to dramatize a book for presentation "on the stage" was held to exclude the presentation by means of motion pictures (see contract set forth at length in 232 Fed. Rep. 242).

In England, a contract covering the "acting rights" is held not to include cinema rights, nor do the words "English performances," embrace them. *Ganthony v.*

G. R. J. Syndicate, Ltd.; and *Wyndham v. A. E. Huebsch & Co., Ltd.* ("The Author," Vol. XXVI, No. 1, of Oct. 1, 1915, pp. 16, 17.) *Kalem Co. v. Harper Bros.*, 222 U. S. 55, distinguished.

The license was not the grant of a right in perpetuity. *Grant v. Maddox*, 15 M. & W. 737; *Broadway Photoplay Co. v. World Film Corp.*, 225 N. Y. 104.

Mr. Charles H. Tuttle, with whom *Mr. William Klein* was on the brief, for respondent:

The agreement, as modified, did not terminate by self-limitation at the end of the six theatrical seasons. It was not an agreement for personal services or for a naked license, but a contract of bargain and sale, whereby property was granted and conveyed. *Frohman v. Fitch*, 164 App. Div. 231, 233.

It goes without saying that where property is conveyed, the conveyance is presumed to be absolute and not revocable at will or for a temporary period, in the absence of clear words of limitation. *Western Union Telegraph Co. v. Pennsylvania Co.*, 129 Fed. Rep. 849, 867, 862.

The provision for at least 75 performances each theatrical season for a specified time was not a grant by the plaintiff but a covenant by the defendant—a statement of the least he was to do. Furthermore, the contract of modification constituted a plain recognition by both parties that the original contract was not limited to the period mentioned and that the only question which was to be considered open, was whether that contract carried the motion picture rights.

The modified contract also shows that the defendant received not a mere personal privilege, but property rights which the parties did not intend should expire by self-limitation at the end of the period referred to in the original contract.

Any construction of the contract, as modified, whereby

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it would be limited to the period of seasons mentioned in the original agreement, would be harsh and oppressive to the defendant.

Quite apart from the special features and circumstances, the absolute character of this grant as not limited to any fixed period of years would follow as a matter of law. 6 Ruling Case Law, § 281; *Western Union Tel. Co. v. Pennsylvania Co.*, *supra*, 861; *McKell v. Chesapeake & Ohio Ry. Co.*, 175 Fed. Rep. 321, 329; *White v. Hoyt*, 73 N. Y. 505, 511; *Duryea v. Mayor*, 62 N. Y. 592, 597.

Even if the contract as modified is to be limited to the period of seasons mentioned in the original contract, the action must fail because premature. That period does not expire until the season of 1918-1919.

The contracts between the parties conferred upon the defendant as part of the production rights, the right to produce the play in motion picture form. The granting clause of the original contract conveyed all the production rights.

The comprehensive force of the word "exclusive" when used in a conveyance of dramatic rights, and its clear purpose to prevent competitive production, have been well stated in *Photo Drama Motion Picture Co. v. Social Uplift Film Corp.*, 213 Fed. Rep. 374, 376; *affd.* 220 Fed. Rep. 448.

The word "represent" is peculiarly appropriate to a motion picture representation of a play.

Section 4952, Rev. Stats., gave the author of a dramatic composition not only the sole right of printing it but also the sole right "of publicly performing or representing it or causing it to be performed or represented by others."

In *Kalem Co. v. Harper Bros.*, 22 F. R. 35, this court held that a motion picture representation of "Ben Hur" was an infringement of the author's copyright, since it was a representation of the story dramatically. See

Daly v. Palmer, 6 Blatchf. 256, 6 Fed. Cas. 1132, Case No. 3552.

Furthermore, unquestionably the grant of an exclusive right to produce, perform and represent a play purports a grant of the exclusive dramatic rights, and the "dramatic rights include motion picture rights," unless that meaning is narrowed by the addition of other words. Before the present contract was made, dramatic rights had acquired that definite and judicially determined meaning by virtue of *Kalem Co. v. Harper Bros.*, *supra*. If the parties to the present contract intended this form of grant to have any less meaning, language was available to reveal that intent. *Tully v. Triangle Film Corp.*, 229 Fed. Rep. 297.

In addition to the breadth of the granting clause itself, there are other provisions in the agreement which prove incontestably the mutual intent to convey the entire right to place the play before the American public in any form.

The expression of certain reservations in favor of the plaintiff was an exclusion of all others.

The courts will not easily accept a construction which would permit the plaintiff to produce motion pictures in competition with the defendant's production on the stage. The courts have frequently discerned the destructive consequences of a motion picture production of the play, synchronously with its production on the stage. *Harper Bros. v. Klaw*, 232 Fed. Rep. 609, 613; *Frohman v. Fitch*, 164 App. Div. 231, 233-234; *Photo Drama Motion Picture Co. v. Social Uplift Film Corp.*, 213 Fed. Rep. 374, 377.

The supplemental contract illustrates the intent of the parties to transfer to the defendant the ownership of the play for all production purposes.

The unbroken tenor of judicial decisions interpreting similar agreements establishes incontestably that the

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motion picture rights were included. *Frohman v. Fitch*, *supra*; *Klein v. Beach*, 239 Fed. Rep. 108, 109; 232 Fed. Rep. 240, 246; *Harper Bros. v. Klaw*, 232 Fed. Rep. 609, 613; *Lipzin v. Gordin*, 166 N. Y. S. 792; *Hart v. Fox*, 166 N. Y. S. 793; *Photo Drama Motion Picture Co. v. Social Uplift Film Corp.*, 220 Fed. Rep. 448; *Kalem Co. v. Harper Bros.*, 222 U. S. 55; s. c. 169 Fed. Rep. 61, 63; *Klaw v. General Film Co.*, 154 N. Y. S. 988; *Universal Film Mfg. Co. v. Copperman*, 212 Fed. Rep. 301; *affd.* 218 Fed. Rep. 577; *Liebler v. Bobbs-Merrill Co.*, 162 App. Div. 900; *Drone, Copyright*, p. 588; *Brackett's Theatrical Law*, p. 61; *Lee v. Simpson*, 3 C. B. 871.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by the author of a play called *Peg O' My Heart* to restrain the defendant, Morosco, from representing the play in motion pictures, in violation of the plaintiff's copyright; and also, although this is a subsidiary question, from producing the play at all. The defendant justifies under an agreement of January 19, 1912, and a supplemental agreement of July 20, 1914, both set forth in the bill. The ground upon which the right to produce the play in any way was denied was that the agreement gave rights only for five years. This construction was rejected by the District Court and the Circuit Court of Appeals. Both Courts held also that the agreement conveyed the right to represent the play in moving pictures and on that ground dismissed the bill. 254 Fed. Rep. 737. 258 Fed. Rep. 557.

By the first agreement the plaintiff, party of the first part "does grant" to Morosco, the party of the second part, "the sole and exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada," subject to the terms and conditions of the contract. Morosco

agrees "to produce the play not later than January first, 1913, and to continue the said play for at least seventy-five performances during the season of 1913-1914 and for each theatrical season thereafter for a period of five years." He agrees further to pay specified percentages on the gross weekly receipts as royalties, and that "if during any one theatrical year . . . said play has not been produced or presented for seventy-five performances, then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part." Morosco further agrees to present the play in first-class theatres with competent companies and with Miss Laurette Taylor (the stage name of the author's wife), in the title rôle; the play to have a production in New York and to be continued on the road for at least one season or longer if considered advisable by both parties. No alterations, eliminations or additions are to be made without the approval of the author and the rehearsals and production of the play are to be under his direction. The author to have the right to print and publish the play but not within six months after the production of the play in New York City without consent. Morosco is not to let or transfer his rights without the author's consent. "Should the play fail in New York City and on the road . . . it shall be released for stock;" i. e., let to stock companies, with an equal division of royalties between plaintiff and defendant. By an addendum, after Miss Taylor should have finished her season her successor in the rôle of "Peg" for any subsequent tours shall be mutually agreeable to both parties. The contract is declared binding upon the parties, "their heirs, executors, assigns, administrators and successors."

The second agreement, in order to adjust controversies and to modify the first, authorized Morosco "as long as this contract is in force" to "produce, perform and represent" the play with or in as many companies as he saw fit,

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without engaging Laurette Taylor and without consulting the plaintiff as to the cast, rehearsals or production of the play. Morosco also was authorized to let or sell any of his rights under the contracts, but he was not to be released from his personal liability to pay the royalties as specified in the contracts. The play might be released for stock whenever the net profits realized from all the companies producing the play should be less than \$2,000, and then the royalties received from the stock theatres were to be divided equally. For four years from date neither party without consent of the other was to produce or give leave to produce the play by moving pictures and after that the rights of the parties were to be determined by and under the original agreement as if the supplemental agreement had not been made.

As to the duration of the defendant's rights we agree with the Courts below. We perceive no ground for converting the defendant's undertaking to continue the play for seventy-five performances during the season of 1913-1914, and for each season thereafter for five years, into a limit of the plaintiff's grant of rights. As was said in the District Court, it is a statement of the least that defendant was to do, not of the most that he was to have. The plaintiff was secured sufficiently by the forfeiture in case the play should not have been produced for seventy-five performances. The provisions in both contracts as to the release for stock are somewhat of an additional indication that it was expected that the arrangement was to last as long as the public liked the play well enough to make it pay, provided the defendant kept his half of the bargain performed.

On the question principally argued we are of opinion that the majority below was wrong. The thing granted was "the sole and exclusive license and liberty to produce, perform and represent" the play within the territorial limits stated, subject to the other terms of the contract.

It may be assumed that those words might carry the right to represent the play in moving pictures if the other terms pointed that way, but to our mind they are inconsistent with any such intent. We need not discuss the abstract question whether, in view of the fact that such a mode of representation was familiar, it was to be expected that it should be mentioned if it was to be granted or should be excluded if it was to be denied. Every detail shows that a representation by spoken drama alone is provided for. The play is to be continued for seventy-five performances for the theatrical seasons named. This applies only to the regular stage. The royalties are adapted only to that mode of presentation. *Harper Bros. v. Klaw*, 232 Fed. Rep. 609, 612. The play is to be presented in first-class theatres with a competent company and with Miss Laurette Taylor in the title rôle, which, of course, does not mean in moving pictures. The stipulations against alterations, eliminations or additions, and that the rehearsals and production of the play shall be under the direction of the author, denote the same thing, and clearly indicate that no other form of production is contemplated. The residuary clause, so to speak, by which the play is to drop to stock companies shows the lowest point to which the author was willing to let it go.

The Courts below based their reasoning upon the impossibility of supposing that the author reserved the right to destroy the value of the right granted, however that right may be characterized, by retaining power to set up the same play in motion pictures a few doors off with a much smaller admission fee. We agree with the premise but not with the conclusion. The implied assumption of the contract seems to us to be that the play was to be produced only as a spoken drama, with respect for the author's natural susceptibility concerning a strict adhesion to the text. We need not amplify the argument presented below against the reservation of the right in

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question. As was said by Judge Hough in a similar case, "there is implied a negative covenant on the part of the [grantor] not to use the ungranted portion of the copyright estate to the detriment, if not destruction, of the licensees' estate. Admittedly if Harper Bros. (or Klaw & Erlanger, for the matter of that) permitted photo-plays of Ben Hur to infest the country, the market for the spoken play would be greatly impaired, if not destroyed." *Harper Bros. v. Klaw*, 232 Fed. Rep. 609, 613. The result is that the plaintiff is entitled to an injunction against the representation of the play in moving pictures, but upon the terms that the plaintiff also shall abstain from presenting or authorizing the presentation of the play in that form in Canada or the United States.

Decree reversed. Injunction to issue upon the condition that the plaintiff shall neither represent nor authorize the representation of the play Peg O' My Heart in moving pictures while the contract with the defendant remains in force.

MR. JUSTICE CLARKE, with whom concurred MR. JUSTICE PITNEY, dissenting.

The decision of this case involves the construction of the written contract of January 19, 1912, as modified by that of July 20, 1914, and, centering its attention upon the claim of the defendant to moving picture rights, the court dismisses in a single paragraph provisions in these contracts which seem to me to so clearly limit the rights of the defendant to a term expiring possibly in May, 1918, but certainly not later than May, 1919, that I cannot concur in the conclusion arrived at by my associates.

The court says:

"As to the duration of the defendant's rights we agree with the Courts below. We see no ground for converting the defendant's undertaking to continue the play for seventy-five performances during the season of 1913-1914,

and for each season thereafter for five years, into a limit of the plaintiff's grant of rights. As was said in the District Court, it is a statement of the least that defendant was to do, not of the most that he was to have."

This expression that the third paragraph of the contract of January 19, 1912, "is a statement of the least that defendant was to do, not of the most that he was to have," is repeated in the opinion of each of the three courts as the sufficient reason for concluding, as the District Court said, that the contract gave to the defendant "all the rights mentioned *for all time*." It is not the first time that a catchy phrase has diverted attention from less picturesque realities.

My reasons for concluding that the rights of the defendant were limited, as the court says his obligations were limited, to a term expiring not later than the close of the theatrical season of 1918-1919 may be briefly stated.

The grant which it is concluded gave the defendant the "exclusive license and liberty to produce, perform and represent" the play involved "for all time" is in these words:

"First: The party of the first part hereby grants . . . to the party of the second part *subject to the terms, conditions and limitations hereinafter expressed*, the sole and exclusive license and liberty to produce, perform and represent the said play in the United States" and Canada.

In terms this is a "license" and in terms also it is subject to "conditions and limitations" to follow in the contract,—which are found in the third and fifth paragraphs.

The third paragraph reads:

"The party of the second part [defendant] agrees to produce the play not later than January first, 1913, and to continue the said play for at least seventy-five per-

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formances during the season 1913-1914 and for each theatrical season thereafter for a period of five years."

The fifth paragraph provides that if the defendant shall fail to produce the play seventy-five times in any one theatrical year "then all rights of the said party of the second part [the defendant] shall cease and determine and shall immediately revert to the said party of the first part."

This third paragraph expresses the agreement of the parties as to what the defendant was to do in consideration of the grant by the plaintiff in the first paragraph, and reading it and the fifth paragraph together, as one, we have the extreme extent and time limit of the defendant's obligation and the penalty, forfeiture, is provided for the failure to perform at any time within that limit. The court says that the third paragraph expresses "the least [all] that defendant was to do," so that his obligation under the contract ended with the five-year period, which obviously would be not later than the close of the theatrical season of 1918-1919. This being true, when did the reciprocal obligation of the plaintiff expire?

That the obligation of the plaintiff continued "for all time" is apparently derived wholly from the inference, as stated by the District Court, that the parties, if they had intended otherwise, "could readily have fixed a time limit in paragraph 'First' by the addition of words such as 'for . . . years from' or 'until' a stated date."

It is very true that the parties could have written their contract in a different form, and certainly with much more precision of statement, than that in which they did write it, but it is also true that in making it in their own way and terms they granted a general license in the first paragraph, but made it subject to the "terms, conditions and limitations" thereafter to be expressed, and that they then went forward and expressed in the third paragraph the five-year limitation as we have seen it. The

court holds that this five-year limitation applies to the defendant's obligation to perform but that it does not apply to the plaintiff's license to produce. I think it applies to both. Plainly the parties were undertaking to set down in their contract the mutual obligations which each intended to assume—those of the one in consideration of those of the other. The author granted the privilege of producing the play and the defendant agreed to produce it for at least seventy-five performances during each of five years. After that, the court concludes, the defendant was no longer bound by the contract to do anything which could advantage the plaintiff and therefore, clearly, the plaintiff should not continue thereafter under obligation to the defendant, unless the intention to be so bound is unmistakably expressed in his contract. The "natural and normal" inference is that when the obligation of one party to such a contract as we have here is ended it was the intention that the obligation of the other party should end also.

The inference that the license to produce continued after the obligation to produce expired, in my judgment, can be sustained only by neglecting the specific provision of the first paragraph, that the license granted is subject to the limitations which should follow, and which did follow in the third paragraph. It involves imposing, by judicial construction, heavy and unusual burdens upon the author of a successful dramatic composition in the interest of a commercial producer—a result which courts should not strain themselves to accomplish.

A penalty of forfeiture being provided for failure of the defendant to perform at any time, I cannot see any substantial reason for inserting the five-year limitation except to fix a limit for the expiration of all rights of both parties and this, it seems to me, was its only function.

The provision in the first contract that if the play should fail "in New York City and on the road," and in the

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second that if the net profits for "one theatrical season" should be less than two thousand dollars, the play should be "released for stock" and the royalties divided equally between the parties, would have ample scope for application within the five-year period and therefore cannot properly be made the basis for the implied continuance of the license beyond that term.

For the reasons thus briefly stated, I think that the parties expressed with sufficient clearness their intention that their mutual relations should all terminate with the expiration of the five-year period, and therefore I dissent from the opinion of the court.

MR. JUSTICE PITNEY concurs in this opinion.
